Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

C. SCOTT JOHNSON, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES; REGINALD WILKINSON, DIRECTOR OF REHABILITATION AND CORRECTION,
Petitioners,

v.

ASSOCIATED GENERAL CONTRACTORS OF OHIO, INC.; ASSOCIATED GENERAL CONTRACTORS OF NORTHWEST OHIO, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a party seeks to overturn a prior decision on the ground that its factual predicate is invalid, does *stare decisis* require that party to bear the burden of producing evidence on the relevant factual issues?

PARTIES

Petitioners are: C. Scott Johnson, Director of the Ohio Department of Administrative Services, and Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction.

Respondents are: the Associated General Contractors of Ohio, Inc., and the Associated General Contractors of Northwest Ohio, Inc.

The following entities participated as *amici curiae*: the Ohio Minority Contractors Association, Inc., the National Association for the Advancement of Colored People, Cleveland Chapter, and the Ohio Association of Businesses that are African-American Owned.

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of the Director of the Ohio Department of Administrative Services and the Director of the Ohio Department of Rehabilitation and Correction, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-18a) is reported at 214 F.3d 730. The order of the district court appealed from (App. 92a-94a) is unreported. The subsequent opinion of the district court denying a stay (App. 19a-91a) is reported at 50 F.Supp.2d 741.

JURISDICTION

The court of appeals issued the judgment on June 1, 2000, and denied rehearing on August 24, 2000. This Court granted an extension of time for filing this petition through December 22, 2000 (00A442). This Court's jurisdiction is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Fourteenth Amendment, Section 1, of the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Ohio Revised Code sections 122.71, in pertinent part, and 123.151, in its entirety, are set forth in the Appendix. App. 110a-111a; App. 112a-120a.

INTRODUCTION

In 1980, against a backdrop of a history of racial discrimination in the awarding of state contracts, the Ohio General Assembly enacted a scheme of laws designed to create a level playing field for contractors doing business with the State of Ohio by ensuring the participation of minority-owned businesses. App. 2a-3a. In 1983, the Sixth Circuit upheld those laws as constitutional. *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). And in 1989, in the landmark decision concerning the use of racial classifications to remedy discrimination in state contracting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 502, 503-04 (1989), this Court cited the Ohio program with approval.

In 1998, an association of contractors challenged the construction contracting portion of the program, charging violations of equal protection. Despite the Sixth Circuit's prior decision upholding the program, the district court placed upon the State the burden of producing evidence that the program is constitutional. On appeal, the Sixth Circuit affirmed that burden, thus raising the question of the proper allocation of the burden of production when a party seeks to overturn a prior court decision.

As presented below, in light of the Sixth Circuit's prior decision upholding the underlying statutory scheme, as well as fundamental principles of *stare decisis*, the challenging party (Respondents here), and not the State, should have borne the burden of producing evidence that the law was no longer supported by a compelling state interest and, therefore, that the prior decision was no longer valid. Because Respondents failed to meet that burden, the court of appeals should have reversed the decision of the district court and upheld the constitutionality of the program.

STATEMENT OF THE CASE

1. The Ohio Program. Ohio's program for minority participation in construction contracting operates in a straightforward manner. Ohio Revised Code (R.C.) section 123.151 generally requires state agencies to set aside for bidding by Minority Business Enterprises (MBEs) five percent of the total value of construction contracts awarded in each fiscal year. R.C. 123.151; App. 112a-120a. Non-minority businesses may bid on contracts identified for minority participation if they are willing to share the profits with a minority firm through partnership or joint venture agreements. R.C. 122.71(E)(1), (2); App. 110a.

Ohio law defines an MBE as "an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals." R.C. 122.71(E)(1); App. 110a. There are specific procedures for certification and listing as an MBE. R.C. 123.151(B); App. 112a-113a.

2. The District Court Proceedings. Enacted in 1980 and upheld in 1983, Ohio's program continued uninterrupted until 1998, when Respondents, the Associated General Contractors of Ohio, Inc., and the Associated General Contractors of Northwest Ohio, Inc. (the Contractors), challenged the MBE program for construction contracting in the district court. The challenge arose when the State set aside for bid by MBEs the contract for a portion of a new prison facility, and ultimately awarded the contract to an MBE. The Contractors alleged that the State's set-aside of the contract, as well as the underlying statute, violated the equal protection guarantee of the Fourteenth Amendment, and they sought declaratory and injunctive relief.

At the start of a preliminary injunction hearing, the district court ordered consolidation with a permanent injunction hearing. During the two-day proceeding, the State presented all of the evidence that was before the Ohio General Assembly when it enacted the law underlying the program in 1980, as well as the compliance reports prepared by state agencies since the law's enactment. The Contractors argued that the latter evidence showed that the State had overutilized minority-owned firms and that the State had failed to conduct a disparity study or otherwise maintain records demonstrating that the MBE program for construction contracting was still justified. The Contractors presented

no evidence to demonstrate the lack of a disparity between minority and non-minority contractors, nor any other evidence sufficient to show affirmatively that the MBE program for construction contracting is not justified.

The State also submitted documents and witness testimony regarding additional evidence that could be prepared if more time were given and, at the end of the hearing, asked for additional time (a six-month trial schedule) to present additional evidence. The court refused.

Following this two-day, consolidated evidentiary hearing, the district court issued an oral bench ruling that, notwithstanding the Sixth Circuit's decision in *Keip*, the laws supporting the MBE program for construction contracting were unconstitutional, and enjoined that program. App. 104a. In its bench ruling, the district court stated that "[t]he party defending the plan bears the burden of producing evidence that the plan is constitutional, while the party challenging the plan retains the ultimate burden of proving its unconstitutionality." App. 97a. The State, the court found, had failed to meet that burden.

3. The Ohio Supreme Court Decision in *Ritchey Produce*. While the appeal in this case was pending, the Ohio Supreme Court decided *Ritchey Produce Co., Inc. v. Ohio Dep't of Admin. Svcs.*, 85 Ohio St.3d 194 (1999). That decision upheld Ohio's MBE program for goods and services contracting. The goods and services program was part of the same 1980 legislative enactment as the construction contracting program at issue here, and it applies the same statutory definition for a qualified minority participant. The Ohio Supreme Court concluded that the State of Ohio had carried its burden by producing the requisite "firm basis in evidence" to support the program, citing judicial,

executive, and administrative findings that detailed the State's participation in past discriminatory practices in the awarding of state contracts—evidence, the court stated, that the Ohio legislature had relied on in enacting the MBE program. *Id.* at 262-63.

The Ohio Supreme Court also concluded that the program is narrowly tailored, specifically holding that the program was preceded by unsuccessful, race-neutral attempts to eliminate discrimination; that it is flexible; and that the goals of the program have a direct relationship to the actual contracting market. *Id.* at 265-70.

The Ohio Supreme Court distinguished the facts of the *Ritchey Produce* case from the facts of this case, which was then pending before the Sixth Circuit. The Supreme Court limited its holding "to the area of state procurement contracting." *Id.* at 274.

4. The District Court Ruling on the State's Motion to Stay. After the *Ritchey Produce* decision, the State moved the district court for a stay of its order pending appeal. App. 21a. The district court issued a lengthy decision outlining its reasons for disagreeing with the Ohio Supreme Court and declined to stay its ruling in this case. App. 19a-91a.

5. The Court of Appeals Decision. The State appealed to the Sixth Circuit, which ultimately upheld the district court's review of Ohio's MBE program for construction contracting. In doing so, the Sixth Circuit not only acknowledged the conflict with its prior decision in *Keip*, but also opined that, in its view, its opinion was "not reconcilable with" *Ritchey Produce*. App. 3a, 17a. The court, also holding that the State bore the burden of production, concluded that the MBE program for construction contracting failed under *Croson* and strict

scrutiny analysis. App. 5a-13a. The court criticized the evidence in the *Keip* case and held that the State had failed to show either a compelling interest or narrow tailoring. *Id.* The court affirmed the district court's decision not to give the State a six-month continuance to gather the evidence it wished to present, concluding that the district court had had sufficient evidence, that the State should have gathered the proper evidence when the law was enacted rather than all these years later, and that Ohio had not kept the kinds of records and statistics necessary to support the program's continuation. App. 13a-15a. On this reasoning, the court of appeals affirmed the decision of the district court.

REASONS FOR GRANTING THE PETITION

This Court should settle the conflict among circuits regarding the proper allocation of evidentiary burdens when a party challenges a previous court decision.

1. The fundamentals of *stare decisis*. "[T]he doctrine of stare decisis is of fundamental importance to the rule of law." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991) (citations omitted). Following precedent "promotes stability, predictability, and respect for judicial authority," *id.*, and results in orderly, evenhanded, and consistent application of legal rules. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). Accordingly, only "some 'special justification'" will support a departure from precedent. *Dickerson v. U.S.*, 120 S.Ct. 2326, 2336 (2000) (citations omitted).

These fundamental principles must, and should, apply to precedent concerning constitutional questions and, therefore, must affect the allocation of evidentiary burdens in such cases. Undoubtedly, a party challenging

the constitutionality of a statute always has the burden of persuasion. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality). Burdens of production may differ in constitutional cases, however, depending on the applicable standard of review.

For instance, rational basis review places the *entire burden of production* on the party challenging the constitutionality of a statute. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). Strict scrutiny review, however, splits the burden of production between the parties. First, the challenger must show that the statute is subject to strict scrutiny by showing, for example, that it involves a racial classification. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. at 505, 508. Then the burden of production shifts to the government to introduce evidence that the statute meets a compelling government interest. *See id.* at 505; *Wygant*, 476 U.S. at 292-93. Finally, the challenger bears the ultimate burden of persuading the court that the law is unconstitutional. *See id.*

Unquestionably, racial classifications are at issue here and, accordingly, strict scrutiny applies. *Adarand*, 515 U.S. 200; *Croson*, 488 U.S. 469. Thus, had the first challenge to Ohio's program occurred after this Court decided *Croson*, strict scrutiny would have obligated the State to produce a "strong basis in evidence" to support a compelling state interest. *See id.* at 500.

But the first challenge to the Ohio program occurred seven years before *Croson*, so this was *not* a first-time challenge. *See Ohio Contractors Ass'n v. Keip*, *supra*. The challengers in this case sought not only to invalidate a longstanding statutory scheme, but also to overturn longstanding circuit precedent validating that scheme on the same grounds—a situation that this Court's

MBE precedent has not addressed, but surely one to which *stare decisis* must still apply.

Basic principles of *stare decisis* require an objecting party to make an unusually strong showing as to why a court should invalidate a prior decision. Indeed, "every successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). And "only the most convincing justification" will suffice "to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the principle on which the Court staked its authority in the first instance." *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992). Absent such a showing, the overruling of precedent comes "at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law." *Id.* at 869.

Consistent with these basic principles, several federal courts of appeals have expressly required a party seeking to overturn a court's prior decision to bear the burden of producing the evidence necessary to convince the court that its earlier decision cannot stand. For example, in *EEOC v. Trabucco*, 791 F.2d 1 (1st Cir. 1986), the First Circuit placed upon the challenger the burden of showing that the factual predicate on which the court had based a prior age-discrimination decision had not been developed adequately to render that decision controlling in future cases on the same issue. The court did so even though the burden of production had properly shifted to the defendant in the earlier case. *See also United States v. 177.51 Acres of Land*, 716 F.2d 78, 81 (1st Cir. 1983) (invoking, in condemnation case, principle that a party challenging validity of a prior court decision "has the

burden of presenting 'persuasive new evidence' of invalidity and demonstrating that there is a 'material distinction' between the cases") (quoting *Illinois Tool Works, Inc. v. Foster Grant Co., Inc.*, 547 F.2d 1300, 1302 (7th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977) (invoking same principle in context of challenge to court's earlier determination that patent was valid)); *Gavin v. Chernoff*, 546 F.2d 457, 458-59 (1st Cir. 1976) (concluding that challenger, having presented neither compelling new reasons nor changes in circumstances sufficient to justify overturning prior *habeas corpus* decision, had not carried its burden); *R.J. Saunders & Co., Inc. v. U.S.*, 54 C.C.P.A. 29 (1966) (holding that challenger in customs case had not presented new factual evidence sufficient to convince the court to overturn prior decision on same issue); *United States ex rel. Townsend v. Twomey*, 452 F.2d 350, 355 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972) (holding that *habeas corpus* applicant had failed to carry burden by failing to produce new legal or factual evidence sufficient to invalidate prior decision on same issue).

Thus, *stare decisis* requires anyone challenging a statutory scheme after the very same challenge has already failed on the merits to carry the burden of production of the evidence at trial, even in a case that would have required strict scrutiny burden shifting had it been a first-time challenge. This requirement makes sense because it respects the principles of finality and consistency in the law and appropriately conserves public resources. The need for finality and consistency, as embodied in the doctrines of *res judicata* and collateral estoppel, for example, as well as in statutes of limitations, is no less important in a case that, although it involves different parties, is in the same court and concerns the very same subject and the very same legal and factual issues as did an earlier case. Thus, consistent with *stare decisis*; the State should not be at risk of having to duplicate such an expenditure of resources at the whim of

successive plaintiffs who, despite the prior court decision, decide to sue anyway.

2. The need for a new rule. When the Contractors filed this case in the district court, the Sixth Circuit had already concluded that Ohio's General Assembly properly enacted the MBE program for construction contracting in 1980. *See Keip, supra.* Once a court has made such a final judicial determination, something must prevent the State from repeatedly being haled into court and made to produce and update, again and again, its evidence (likely to be detailed, complex, and voluminous) of the validity of the program. If that were permissible, challengers thinking themselves aggrieved by the program could repeatedly file lawsuits attacking the program and could then force the State and the courts to endure multiple trials of an issue that has already been decided.

Non-strict-scrutiny cases avoid this problem by placing the entire burden of production on the challenging party. But the burden-shifting procedure in strict scrutiny cases leaves the government much more vulnerable to duplicative lawsuits unless a rule is formulated to ensure that the government need not carry its burden more than once in litigation of the same issue.

The record in this case illustrates the need for such a rule, as well as the conundrum for a State presented with this situation. In this case, the district court imposed upon the State the entire burden of production, which, according to the Sixth Circuit, the State could meet only with specificity and explicit findings. App. 6a-7a. Yet, the district court required the State to carry that heavy burden without the benefit of a normal trial schedule. Instead, the State apparently should have stood ready for fifteen years, prepared to defend at any time and in any forum, with just seven

days' notice, its MBE programs. *See* App. 14a (" . . . the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding").

So, despite a prior decision by the Sixth Circuit that the program is valid, the court required the State to carry the burden of production. Despite the passage of time since the program's inception, the court required the State to meet that burden with new evidence. And despite the need for new evidence, the court refused to grant the State a normal trial schedule. Surely the law entitled the State, when defending the constitutionality of a statute previously upheld, to more. Indeed, basic principles of *stare decisis* entitle the State to the same allocation of evidentiary burdens that courts, as shown above, apply in other cases.

The Contractors in this case failed to make a showing that would support overturning the Sixth Circuit's prior decision, and therefore failed to carry their burden. They presented no evidence to demonstrate the lack of a disparity between minority and non-minority contractors, nor any other evidence sufficient to show affirmatively that the MBE program for construction contracting is not justified.

For these reasons, the court of appeals should have reversed the district court's decision and upheld the challenged program as constitutional. But the Sixth Circuit, ignoring long-established principles of *stare decisis*, and despite arguments in the briefs concerning the *stare decisis* effect of *Keip* on the evidentiary burdens in this case, erroneously confirmed that the burden of producing factual evidence in this second equal protection challenge again belonged to the State. The Sixth Circuit thereby placed itself in conflict with other circuit courts on the issue of the proper allocation of the burden of production when a prior decision by a court is challenged.

3. The impact of the Ohio Supreme Court's decision. While this challenge to the State's MBE program for construction contracting was pending before the Sixth Circuit, the Ohio Supreme Court decided a case presenting a parallel constitutional question regarding the State's MBE program for goods and services contracting. In *Ritchey Produce, supra*, the Ohio Supreme Court, applying strict scrutiny, unanimously upheld the MBE program for goods and services as constitutional.

Ritchey Produce, supra, stands as a comprehensive decision upholding a program that was part of the same 1980 enabling legislation at issue here and that applies the same statutory classifications. The Ohio Supreme Court concluded, consistent with the conclusions of the Sixth Circuit in 1983 and this Court's observation in *Croson*, "that the General Assembly had a 'strong basis in evidence' for finding that remedial action was necessary to ameliorate the effects of identified racial discrimination in which the state itself had either actively or passively participated." *Ritchey Produce*, 85 Ohio St.3d at 260; *see also Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Acknowledging the district court's decision in this case, the Ohio Supreme Court in *Ritchey* distinguished the cases. As the Ohio Supreme Court noted, the district court's order dealt only with state construction contracts and subcontracts. In contrast, the *Ritchey* case dealt "with the denial of an application for MBE recertification of a business that was formerly certified to bid on state purchasing contracts for goods and services, *i.e.*, contracts set aside under R.C. 125.081(A)—not R.C. 123.151." *Id.* at 274. Having made this distinction, the Ohio court stated, "We specifically wish to avoid a direct conflict between the case at bar and [the federal case, *Drabik*]. Thus, we limit our holding today to the area of state procurement contracting. We do so in the interests of

state and federal judicial comity and because the facts of the case at bar are amenable to a limited holding." *Id.*

The Sixth Circuit disagreed, however. The court of appeals found that its opinion "is not reconcilable with *Ritchey*, despite the Ohio Supreme Court's attempt to distinguish the cases." App. 17a-18a.

The State agrees with the Ohio Supreme Court that the cases are factually distinguishable, but recognizes that the cases are nonetheless inconsistent as to the constitutionality of the statutory classifications underlying both MBE programs. That inconsistency, however, is not before the Court and does not change the question presented. Indeed, both the Ohio Supreme Court and the Sixth Circuit imposed the burden of production on the State and, therefore, failed to account adequately for *Keip* and the *stare decisis* effect of that decision.

4. The need for careful review. Finally, this Court has cautioned that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273-74, citing *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.). The State agrees. Indeed, "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501.

But even in its efforts "to 'smoke out' illegitimate uses of race," *id.* at 493, a court may not ignore the possibility that a State has identified and addressed the vestiges of racial discrimination, all within constitutional parameters, *and that a prior court properly held so.* Nor may a court ignore the burdens that an objecting party must ordinarily and necessarily meet to show how or why

the passage of time has caused that prior decision to become invalid. A court may not presuppose that a State can never satisfy strict scrutiny in defense of a state statute, especially where that statute has survived a previous challenge. Such presupposition conflicts with this Court's admonition against concluding too quickly that a government's attempts to address the persistent practice and lingering effects of racial discrimination are unlawful, *Adarand Constructors, Inc. v. Pena,* 515 U.S. at 237, and conflicts with fundamental principles of *stare decisis*.

CONCLUSION

For these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-4393

ASSOCIATED GENERAL CONTRACTORS OF OHIO, INC.; ASSOCIATED GENERAL CONTRACTORS OF NORTHWEST OHIO, INC.,
Plaintiffs-Appellees,

v.

SANDRA A. DRABIK, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES; REGINALD WILKINSON, DIRECTOR OF REHABILITATION AND CORRECTION,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 98-00943—James L. Graham, District Judge.

Argued: January 28, 2000
Decided and Filed: June 1, 2000

Before: KENNEDY, RYAN, and BOGGS, Circuit Judges.

ARGUED: Judith L. French, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellants. Kevin R. McDermott, SCHOTTENSTEIN, ZOX & DUNN, Columbus, Ohio, for Appellees. ON **BRIEF:** Judith L. French, Karen L. Killian, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellants. Kevin R. McDermott, SCHOTTENSTEIN, ZOX & DUNN, Columbus, Ohio, for Appellees. James L.

Hardiman, HARDIMAN, BUCHANAN, HOWLAND & TRIVERS, Cleveland, Ohio, Michele R. Comer, Cleveland, Ohio, Norman C. Amaker, LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW, Chicago, Illinois, Vincene Verdun, OHIO STATE COLLEGE OF LAW, Columbus, Ohio, for Amici Curiae.

OPINION

BOGGS, Circuit Judge. Associated General Contractors of Ohio, and Associated General Contractors of Northwest Ohio ("Plaintiffs-Appellees"), representing Ohio building contractors, sued to stop the award of a construction contract for the Toledo Correctional Facility to a minority-owned business ("MBE"), in a bidding process from which non-minority-owned firms were statutorily excluded under Ohio's Minority Business Enterprise Act ("MBEA"). Plaintiffs-Appellees claimed the MBEA is unconstitutional, in that it violates the Fourteenth Amendment's Equal Protection Clause. The district court agreed, and permanently enjoined the state from awarding any construction contracts thereunder. Defendant-Appellant Sandra Drabik, Director of the Ohio Department of Administrative Services ("DAS"), which coordinates and manages state construction projects, and other Defendants-Appellants, appeal the district court's order. We affirm.

I

Ohio passed the Minority Business Enterprise Act ("MBEA") in 1980. This legislation set aside five percent, by value, of all state construction projects for bidding by certified MBEs exclusively. O.R.C. § 123.151(C)(1). Other provisions govern subcontracting to MBEs of work awarded under this scheme. Ohio defines an MBE as a

venture owned and controlled, to the extent of fifty-one percent, for at least one year previous, by "members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals." O.R.C. § 122.71(E). Other provisions establish procedures for certification and listing as an MBE; in what follows, "MBE" will be understood to refer to such officially certified businesses. As of October 1998, DAS maintained a list of 1,180 MBEs.

Pursuant to the MBEA, DAS decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility's Administration Building, which represents twenty percent of the total project's value of $50 million. Non-MBEs, many of whom are members of the plaintiff trade associations, will thus be excluded on racial grounds from bidding on that aspect of the project, and will be restricted in their participation as subcontractors. MBEs are, of course, free to bid on, and participate fully in, non-set-aside as well as set-aside contracts.

This court ruled in 1983 that the MBEA was constitutional, *see Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983), overruling Judge Kinneary's judgment in the district court that Ohio's scheme was unconstitutional on its face, *see Ohio Contractors Ass'n v. Keip*, No. C-2-82-446 (S.D. Oh. Dec. 15, 1982). Subsequently, the Supreme Court, in two landmark decisions, explained and applied at length the criteria of strict scrutiny under which such racially preferential set-asides were to be evaluated. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). This court had already, in *Michigan Road Builders Ass'n v. Miliken*, 834 F.2d 583 (6th Cir. 1987), taken note of the trend developing both in the Supreme Court and Circuit Courts (which was to culminate in *Croson* and *Adarand*) to apply the Equal

Protection Clause strictly to racial discrimination in government contracting. *Michigan Road Builders* departed from the more relaxed treatment that *Keip* had accorded to equal protection challenges to state contracting disputes. *See id.* at 598 (Lively, C.J., dissenting). *Croson* also noted that same evolution in this Circuit. *See* 488 U.S. at 477.

Ohio's MBEA was passed after many years, during the 1970s, of executive and administrative agency task force consideration of complaints regarding, and statistics concerning, minority group participation in state construction contracts. These, and the legislative hearings and debates that immediately preceded passage of the MBEA, are detailed by Judge Kinneary in his 1982 decision striking down that act.

In the light of *Croson* and *Adarand*, the district court in this case returned to the prescient standards under which the MBEA had been invalidated in 1982. Reviewing the evidence, Judge Graham, at the close of a hearing held on October 26, 1998 to consider the state's request for a six-month continuance (which was denied), cites Judge Kinneary's 1982 analysis, which anticipated that of *Croson*, with complete approval. Judge Graham found the MBEA patently unconstitutional: "I am mindful of the fact that it is certainly unusual for a court to declare a state statute which has such far-reaching effects unconstitutional from the bench, but I cannot imagine any clearer case than this for the unconstitutionality of the state statute."

The district court also referred to a 1997 ruling from the Ohio Court of Appeals on the MBEA. In that case, a business owner of Lebanese descent, who was denied certification as an MBE on the grounds he was not an Oriental, claimed his right to equal protection was violated by the MBEA as applied to him. The Court of

Appeals affirmed the trial court's ruling that the MBEA's per-se race classification is unconstitutional. That ruling has since been overturned by the Ohio Supreme Court, which, in a lengthy review of minority set-aside jurisprudence, concluded that the MBEA was constitutional. *See Ritchey Produce Co. v. State of Ohio Dep't of Administrative Services*, 1997 WL 629965 (Ohio App. 10 Dist. Oct. 7, 1997), *rev'd*, 85 Ohio St.3d 194, 707 N.E.2d 871 (1999). At the time of the district court's ruling, *Ritchey* was still pending in the Ohio Supreme Court. Hence, Ohio argued that the district court should have abstained from making a decision. A motion to that effect was filed with the district court, which denied it after an extensive consideration of abstention doctrine. This appeal also argues that the district court's denial of the abstention motion was error.

II

A

"The constitutionality of a statute is a question of law, reviewable de novo." *Hadix v. Johnson*, 144 F.3d 925, 938 (6th Cir. 1998) (citing *United States v. Brown*, 25 F.3d 307, 308 (6th Cir.), *cert. denied*, 513 U.S. 1045 (1994)).

Croson reaffirmed the "strict scrutiny" standard of review adopted by the Court for preferential programs based on racial or ethnic criteria in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). *See Croson*, 488 U.S. at 494. This requires that such a program be "narrowly tailored" to satisfy a "compelling governmental interest." 476 U.S. at 274 (quoting *Fullilove v. Klutznik*, 448 U.S. 448, 480 (1980) ("narrowly tailored"); *Pallmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("compelling governmental interest")). *Adarand* reiterated this standard for "all

racial classifications imposed by whatever federal, state, or local governmental actor. . . ." *See* 515 U.S. at 227.

In discussing this issue, it is important to identify precisely the compelling state interest that might be able to overcome the general presumption against racial classification. It is clear that a government "has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492. However, statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate such an evil. It is an unfortunate aspect of reality that there is never more than 100% of anything; thus, raising the percentage allocated to some portion of the total population necessarily means a corresponding reduction in what is available to other portions.

There is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *See Croson*, 488 U.S. at 503; *United Black Firefights Ass'n v. City of Akron*, 976 F.2d 999, 1010-11 (6th Cir. 1992). However, to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination. Rather, the Supreme Court has told us that the state bears the burden of demonstrating a "strong basis in evidence for its conclusion that remedial action was necessary" by proving either that the state itself discriminated in the past or was a passive participant in private industry's discriminatory practices. *Croson*, 488 U.S. at 486-92, 500.

Thus, the linchpin of the *Croson* analysis, for present purposes, is not simply its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must "identify

discrimination with some specificity before they may use race-conscious relief;" explicit "findings of a constitutional or statutory violation must be made." 488 U.S. at 497.

In ruling against the State of Ohio in 1982, Judge Kinneary had held that the evidence presented by state studies from the middle and latter 1970s was inadequate to support a conclusion of specific historical discrimination calling for remediation, such as might justify the MBEA. More recently, this court has ruled that seventeen-year old evidence of discrimination is "too remote to support a finding of compelling government interest to justify the affirmative action plan," and struck down a continuing affirmative action program for female firefighters on the ground that outdated evidence does not reflect "prior unremedied or current discrimination." *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994). The MBEA suffers from the same defect.

Moreover, Judge Kinneary anticipated *Croson*'s insistence on explicit findings in the following observation:

> In all the documentary evidence relating to the progress of [the MBEA] through the legislature, including drafts of bills, Legislative Service Commission summaries, and transcripts of floor debate, there is not one clear, unambiguous statement of a finding of discrimination to be found.

When, in 1983, this court overturned Judge Kinneary's ruling in that case, we did so out of deference to the legislature, giving it the benefit of the doubt that implicit factfinding of discrimination underlay the MBEA. *See Keip*, 713 F.3d at 170-71. But the Supreme Court has since required more. *See Miller v. Johnson*, 515 U.S. 900,

923 (1995) (holding legislation adopting racial distinctions to be entitled to no deference); *Croson*, 488 U.S. at 499 (holding mere assertions of legislative purposes insufficient).

Proponents of racially discriminatory systems such as the MBEA have sought to generate the necessary evidence by a variety of means. *See, e.g.*, George Stephanopoulos & Christopher Edley, Jr., Affirmative Action Review: Report to the President (July 19, 1995), repr. in BNA Daily Labor Report, 139 DLR S-1, 1995. However, such efforts have generally focused on mere "underrepresentation"—a lesser percentage of contracts awarded to a particular group than that group's percentage in the general population. *See, e.g., id.* at § 9.1.2 (reporting that, in 1986, "minority business received only . . . 2.7 percent of the prime contract dollar" and characterizing that situation, without further analysis, as "discrimination"); *Croson*, 488 U.S. at 479-80 (noting that Richmond's set-aside scheme relied on findings that only .67% of prime city construction contracts had been awarded to minority firms, in a city with a 50% African-American population). Raw statistical disparity of this sort is part of the evidence offered by Ohio in this case. *See* JA IV at 45 (Defendant's Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction). But such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant. *See Croson*, 488 U.S. at 501-02. And although Ohio's most "compelling" statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio—thus marshaling stronger statistics than the statistics in *Croson*—it is still insufficient. The problem with Ohio's statistical comparison is that the percentage of minority-owned businesses in Ohio (7% as of 1978) did not take into

account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.

The statistical evidence that the Ohio legislature had before it, when the MBEA was enacted, consisted of four broad categories of data. The first was statistical evidence gathered by DAS for the years 1957 to 1979. This showed that only 0.21 percent of all state construction contracts went to "identifiable minority businesses." Brief of Defendants-Appellants at 14. The second was a DAS study, cited in *Keip*, 713 F.2d at 171, showing that from 1959 to 1975, of the $1.14 billion paid out by the state in general construction contracts, only 0.24% went to minority businesses. *Id.* at 15. The third was 1977 report, issued by the Ohio Legislative Budget Office, detailing Ohio Department of Transportation ("ODOT") construction contracts garnered by minorities, showing figures of 0.13, 0.3, and 0.18 percent for the years 1975, 1976, and 1977, respectively. *Ibid.* Fourth, a 1978 task force established by the Ohio Attorney General to study the problem concluded that during 1975-77 minority businesses comprised seven percent of all Ohio businesses, but minority businesses received only 0.5 percent of ODOT purchasing contracts. *Id.* at 15-16. Ohio contends that "[t]his is precisely the kind of statistical data lacking in *Croson*." *Id.* at 18. Though this was more data than was submitted in *Croson*, it is not sufficient under that standard.

The deficiencies of the data are glaringly clear. Much of it is severely limited in scope (ODOT contracts) or is irrelevant to this case (ODOT *purchasing* contracts). As noted previously, the data does not distinguish minority construction contractors from minority businesses generally, and *a fortiori* makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction

contracts of any particular size. And although Ohio insists that its program is "narrowly tailored," *id.* at 20-28, it concedes that "AGC showed that the State had not performed a recent study." *Id.* at 19.

Even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete. Any time two non-minority firms merge, or a minority firm splits in two, the total proportion of minority contracting firms in the state increases; but it would be ludicrous to imagine that such alteration affects the overall degree of discrimination.

The only cases found to present the necessary "compelling interest" sufficient to "justif[y] a narrowly tailored race-based remedy" are those that expose, as in the case of the Alabama Department of Public Safety in 1987, "pervasive, systematic, and obstinate discriminatory conduct," *Adarand*, 515 U.S. at 237 (citing *United States v. Paradise*, 480 U.S. 149 (1987)). Ohio has made no such showing.

A second and separate hurdle for the MBEA is its failure of narrow tailoring. *Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting, *Croson*, [488 U.S.] at 507 ... or whether the

program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate,' *Fullilove*, [448 U.S.] at 513. . . ." *Adarand*, 515 U.S. at 237-38. A narrowly-tailored set-aside program must be "linked to identified discrimination." *Croson*, 488 U.S. at 507. Its criteria and measures of success must be particularized, not reduced to rigid quotas driven by "simple administrative convenience." *Id.* at 508. It must also not suffer from "overinclusiveness." *Id.* at 506.

To begin with the last-named factor in narrow tailoring analysis, the MBEA suffers from defects both of over- and underinclusiveness. By lumping together the groups of Blacks, Native Americans, Hispanics, and Orientals (and leaving unclear the exact extent of the last two designations), the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. Thus, the MBEA is satisfied if contractors of, let us say, Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. Obviously, other possible examples of this sort can be readily imagined. As the Supreme Court remarked, invalidating Richmond's set-aside program, if it were "'narrowly tailored' to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?" *Croson*, 488 U.S. at 506.

In addition to the foregoing problems, Ohio's own "underutilization" statistics suffer from a fatal conceptual flaw, as the district court noted: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. While it might be true that most or all of the relevant firms

would have sought to take advantage of the special minority program, there is simply no examination of whether contracts are being awarded to minority firms who have never sought such preference, whether from principle, oversight, calculation of the worth of the program, or for some other reason, and who have been awarded contracts in open bidding.

Narrow tailoring also implies some sensitivity to the possibility that a program might someday have satisfied its purposes. As previously noted, a race-based preference program must be "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Adarand*, 515 U.S. at 238 (quoting *Fullilove v. Klutznick*, 448 U.S. 491, 513 (1980)). The district court in this case took note of the outdated character of any evidence that might have been marshaled in support of the MBEA and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. During the debate over the bill in 1980, an amendment had been offered to include a three-year "sunset" provision; this was defeated. The MBEA has remained in effect for twenty years and has no set expiration. This despite, at best, marginally adequate evidence of discrimination from 1975, 1978, and 1979. As quoted above, *supra*, at 9, Ohio concedes this deficiency.

Finally, as mentioned above, one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *See* 488 U.S. at 507. Yet, as the district court noted in an opinion written to accompany its denial of a motion to stay its judgment pending this appeal, the historical record contains no evidence "that the Ohio General Assembly gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-

based quotas." *Associated Gen'l Contractors of Ohio, Inc., et al. v. Drabik, et al.*, 50 F.Supp.2d 741, 764 (S.D. Oh. 1999).

B

The district court's denial of a motion for continuance, and its decision to consolidate the preliminary injunction hearing with a hearing on the merits, pursuant to Fed. R. Civ. P. 65(a)(2), were based on its findings of fact, and its view of the sufficiency of the evidence presented; it deemed the additional evidence that the state sought time to muster unlikely to be relevant. A district court's determinations of relevancy are subject to review for abuse of discretion. *See United States v. Seago*, 930 F.2d 482, 494 (6th Cir. 1991). The denial of a motion for continuance is also reviewed for abuse of discretion. *See United States v. Martin*, 740 F.2d 1352, 1360 (6th Cir. 1984) (citing *Avery v. Alabama*, 308 U.S. 444 (1940)). "To determine if there has been abuse, we look to see if the defendant suffered any actual prejudice as a result of the denial, [and] whether additional time would have produced more witnesses or added something to the defendant's case." *Ibid.*

We also review for abuse of discretion a district court's decision to consolidate a hearing for a preliminary injunction with a trial on the merits. *See, e.g., Berry v. Bean,* 796 F.2d 713, 719 (4th Cir. 1986); *Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 WL 35571, at *2 (6th Cir. Jan. 29, 1997). The district court, in consolidating the preliminary injunction hearing with a trial on the merits, denied the state's request for additional time to gather evidentiary support for the MBEA. But the MBEA has been in existence for almost twenty years, while *Croson* was decided eleven years, and *Adarand* more than four years, ago. Ohio provides no

specifics as to the avenues it would pursue to marshal the statistics it apparently never thought relevant until now.

The district court found that the supplementation of the state's existing data which might be offered given a six-month's continuance would not sufficiently enhance the relevance of the evidence to justify the delay. As Appellees point out in their Brief at 50-51, under *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute in advance of its passage; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding. *See Croson*, 488 U.S. at 504 (requiring that governmental entities "must identify that discrimination . . . with some specificity *before* they may use race-conscious relief" (emphasis added)).

The district court also noted that the state had admittedly been lax, to say the least, in maintaining the type of statistics that would be necessary to undergird its affirmative action program. The proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program, in order to judge its appropriate limits. But, as noted above, the state does not even know how many minority-owned businesses are *not* certified as MBEs, and how many of them have been successful in obtaining state contracts. The court's review of these deficiencies showed a firm grasp of the evidence that had been offered. Therefore, it cannot be said that the district court abused its discretion in denying the motion for a continuance or in consolidating the preliminary injunction hearing with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2).

The district court's findings of fact, though made from the bench, are sufficient to permit this court to weigh the merits of the ruling and this appeal; oral findings of fact are explicitly contemplated by Fed. R. Civ.

P. 52(a). However, we note that in a case of this importance it would have been helpful had the district court reduced to a contemporaneous writing the reasoning behind its decision of November 2, 1998. Its written ruling of May 20, 1999, denying a motion for the stay of its decision pending appeal, is not an adequate substitute. *See Associated Gen'l Contractors of Ohio, Inc., et al. v. Drabik, et al.*, 50 F. Supp.2d 741 (S.D. Oh. 1999).

C

The State of Ohio argues that the district court should have abstained from exercising its jurisdiction in this case, on *Pullman* grounds, given the pendency before the Ohio Supreme Court of *Ritchey*. We are not persuaded.

Pullman abstention is derived from a case in which a Fourteenth Amendment Equal Protection Clause challenge to a Texas railroad personnel regulation was held to have been prematurely adjudicated in federal court, since a state court's consideration might have rendered the regulation invalid on state law grounds and rendered the federal constitutional question moot. *See Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). The *Pullman* abstention doctrine requires that "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975).

A district court's denial of a motion to abstain is reviewed by this court de novo. *See McDonald v. Village of Northport, Mich.*, 164 F.3d 964, 967-68 (6th Cir. 1999) (citing *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th

Cir. 1985) ("Because theories of state and federal law, and expressions of federalism and comity, are so interrelated in the decision to abstain such dispositions are elevated to a level of importance dictating de novo appellate review.")). Abstention is, however, "a limited exception to the 'virtually unflagging' obligation of federal courts to exercise the jurisdiction given them." *Id.* at 968 (citing *Colorado River Water Conservation Dist.*, 424 U.S. 800, 813, & 817 (1976)).

Ritchey, the state case in favor of which the district court declined to abstain, concerned the refusal of the state to certify as an MBE a produce company wholly owned by Namid Ritchey, a naturalized native of Lebanon. Ritchey wanted preference, or if not, wanted no one to get preference. After several rounds of DAS administrative rulings, appeals therefrom, and a final determination by the Director of DAS that Ritchey Produce was not certifiable as an MBE because Namid Ritchey was not "Oriental," Ritchey took his case to the Ohio courts. The questions presented were (a) whether the MBEA is constitutional, and (b) whether a person of Lebanese origin qualifies as an "Oriental." The common pleas court, adopting the magistrate judge's recommendations, held that the race-based MBE program was unconstitutional, and that MBE certification could only survive strict scrutiny by being recast in terms of economic disadvantage. Ohio appealed, whereupon the Ohio Court of Appeals held that "the state's MBE program is a race per-se classification" that violates the Equal Protection Clause, and did not reach the second question of Ritchey's racial status. 1997 WL 629965, at *3. One judge concurred in the judgment, but on the grounds that Ritchey was, indeed, an Oriental. *See id.* at *3-4 (Tyack, J., concurring). The Ohio Supreme Court reversed the lower court's holding that the MBEA was unconstitutional, and also found "that the term 'Orientals,' as that term is used in R.C. 122.71(E)(1), does

not include people of Lebanese ancestry." 85 Ohio St.3d at 272; 707 N.E.2d at 927. It then took note of the apparent conflict between its ruling and that of the federal district court. It sought to minimize the conflict, by insisting that its holding that the MBEA is constitutional was a narrow one:

> We specifically wish to avoid a direct conflict between the case at bar and the specific requirements of Judge Graham's order in Associated Gen. Contrs. of Ohio, Inc. Thus, we limit our holding today to the area of state procurement contracting. We do so in the interests of state and federal judicial comity and because the facts of the case at bar are amenable to a limited holding.

85 Ohio St.3d at 274; 707 N.E.2d at 928.

Although *Ritchey* involved not state construction set-asides but the preference for MBEs in purchasing contracts, the statistics and the rationale underlying both those MBE programs are the same, and the constitutionality of the overall MBE scheme was before the state court, as it was before the district court. A federal court owes no duty to abstain in deference to a state court when a federal constitutional question is at issue. *See England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415-16 (1964) (noting the "primacy of the federal judiciary in deciding questions of federal law"). Moreover, even if the Ohio Supreme Court could have avoided the federal constitutional question in *Ritchey* by a decision on state law grounds, i.e., that Ritchey is not "Oriental," such a decision would not render moot the federal constitutional issue presented in the instant case. We note, in closing, that our opinion is not reconcilable with *Ritchey*, despite the Ohio Supreme

Court's attempt to distinguish the cases. *See* 50 F.Supp.2d at 744.

III

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

APPENDIX B-1

The Associated General Contractors of Ohio, Inc., et al.,
Plaintiffs,

vs.

Sandra Drabik, et al.,
Defendants.

Case No. C2-98-943

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

50 F. Supp. 2d 741; 1999 U.S. Dist. LEXIS 7696

May 20, 1999, Decided
May 20, 1999, Filed

JUDGES: JAMES L. GRAHAM, United States District Judge.

OPINION BY: JAMES L. GRAHAM

OPINION AND ORDER

I.

On November 2, 1998, this court struck down Ohio Revised Code §123.151, which provides race-based preferences in the award of state construction contracts, holding that it violated the Equal Protection Clause of the United States Constitution. Two weeks earlier, the United States [**2] District Court for the Northern

District of Ohio, likewise, found this Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F. Supp.2d 571 (N.D. Ohio 1998). The state defendant's appealed this court's decision to the United States Court of Appeals for the Sixth Circuit. Thereafter, the Supreme Court of Ohio held, in the case of *Ritchey Produce Co., Inc. v. State of Ohio, Department of Administrative Service*, 85 Ohio St.3d 194, 707 N.E.2d 871 (1999), decided on April 7, 1999, that Ohio Rev. Code §125.081, which provides race-based preferences in the state's purchase of nonconstruction-related goods and services, is constitutional.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions cannot be reconciled. The state relied on the same evidence and the same legal arguments to justify both programs. Indeed, both statutes were enacted as part of a 1980 Minority Business Enterprise ("MBE") Act. In *Ritchey Produce*, the Ohio Supreme Court, without elaboration, simply noted that its conclusions were "at odds" with the rationale of this court's order of November 2, 1998.

The action of the Supreme Court of Ohio in deciding *Ritchey Produce*, while the fundamental issues relating to the constitutionality of Ohio's 1980 MBE Program were pending before the United States Court of Appeals for the Sixth Circuit, has created an unfortunate tension between the state and federal judicial systems. This court, however, while it has the highest respect for the Supreme Court of Ohio, is not bound by state court decisions on issues involving the United States Constitution. While the state courts have the jurisdiction to decide such issues, the federal courts have primacy in

deciding questions of federal law. *See England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415-16 (1964).

It is all the more unfortunate that the Ohio Supreme Court undertook to decide whether the state of Ohio had a compelling interest to grant race-based preferences when the plaintiff in *Ritchey Produce* had chosen not to contest that issue and there was no party before the court who was effectively litigating the interests of Ohio's non-minority businesses on that critically important issue. This court believes that deciding extremely important constitutional issues in a vacuum of the adversarial process can—and in the *Ritchey Produce* case did—lead to error.

In the aftermath of this court's decision and the decision of the Northern District of Ohio in *Buddie Contracting*, the state of Ohio dismantled its system of race-based preferences in all state purchasing; not only construction, but goods and services as well. Now, as a result of the Ohio Supreme Court's decision in *Ritchey Produce*, the state is in the process of reestablishing its clearly unconstitutional fifteen percent race-based quota in goods and services.

On April 8, 1999, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The state's motion has given this court the opportunity to reconsider its decision of November 2, 1998, and to carefully examine the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*. This court has reached the firm conclusion that its original decision was correct, and that a stay of its order would only serve to perpetuate a blatantly unconstitutional program of race-based benefits. This court is convinced that *Ritchey Produce* was wrongly

decided by the Ohio Supreme Court. The court will begin by summarizing its reasons for these conclusions and will discuss them in greater detail in the following sections of this Opinion and Order.

Ritchey Produce was wrongly decided because:

1. Ohio's program of race-based preferences in the award of state contracts is unconstitutional because it is unlimited in duration. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238 (1995) (A race-based remedy must be appropriately limited such that it "will not last longer than the discriminatory effects it is designed to eliminate.").

2. A program of race-based benefits cannot be supported by evidence of discrimination which is now over twenty years old. *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied sub nom Brunet v. Tucker*, 510 U.S. 1164 (1994) (Fourteen-year-old evidence of discrimination "too remote to support a compelling governmental interest.")

3. The state court found that there was a "severe numerical imbalance in the amount of business the state did with minority-owned enterprises," *Ritchey Produce*, 85 Ohio St.3d at 262, 707 N.E.2d at 919, based on its uncritical acceptance of essentially worthless calculations contained in a twenty-one-year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of

state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report. *See* pp. 6-7, and Section IV (e), *infra*.

4. The state court failed to recognize that even the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7 percent) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *United States v. Paradise*, 480 U.S. 149, 171 (1987). (In assessing the appropriateness of race-conscious relief, courts have generally looked to several factors, including the relationship of the goals to the relevant market.).

5. The state court applied a clearly incorrect rule of law when it announced that Ohio's program of race-based preferences in state contracting must be upheld unless it is clearly unconstitutional beyond a reasonable doubt. The Supreme Court of the United States has said, to the contrary, that all racial classifications are highly suspect and must be subjected to strict judicial scrutiny. *City of Richmond v. J.A. Croson*, 488 U.S. 469, 494 (1989); *Adarand*, 515 U.S. at 236.

6. The evidence of past discrimination which the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Croson*, 488 U.S. at 500 (The state must have a "strong basis in evidence for its 'conclusion that remedial action was necessary.'").

In *Ritchey Produce*, the Supreme Court of Ohio summarized its understanding of the evidence the Ohio legislature had when it enacted the MBE Act of 1980 as follows:

> When Ohio's General Assembly enacted the 1980 MBE program, the General Assembly had a wealth of evidence before it. The evidence considered by the General Assembly included past judicial decisions confirming the existence of discrimination in state contracting and establishing the state's acquiescence in such discriminatory practices, executive findings of discrimination in state contracting opportunities, administrative findings of the need for affirmative action, testimony of opponents and proponents of minority set-asides, and a host of relevant statistical evidence showing the severe numerical imbalance in the amount of business the state did with minority-owned enterprises. The evidence that was before the General Assembly showed, *inter alia*, a gross statistical disparity between the number of qualified MBEs in Ohio and the number of contracts awarded to Ohio's minority businesses. The 1978 task force report indicated, among other things, that minority businesses constituted approximately seven percent of all Ohio businesses, but that minority businesses were receiving less than one-half of one percent of state purchasing contacts. A study by ODAS also indicated a disparity in the general construction contracts awarded

> to minority businesses, as did a report issued by Legislative Budget Office.

Ritchey Produce, 85 Ohio St.3d at 262, 707 N.E.2d at 919.

This description of the evidence bears little resemblance to the actual facts. The past judicial decisions considered by the General Assembly consisted of two cases. The first was a 1967 federal court decision which involved discrimination by labor unions against black construction workers. The court did not consider, much less make any findings on the issue of discrimination in the award of state contracts. The second case was an unreported, unappealed decision of an Ohio trial court in a case which was tried before the requirements of strict scrutiny were established by the Supreme Court of the United States, and which was tried on the theory, since rejected by the nation's highest Court, that evidence of past societal discrimination was sufficient to support race-based remedies. The court found that "there exists in the awarding of state contracts a discrimination against [specified minority owned businesses]," but neglected to say when, how, or by whom the discrimination was practiced, and failed to find, as the law now requires, that the state itself had been an active or passive participant in it. *See Ohio Building Chapter, AGC v. Jackson*, Franklin C.P. Nos. 78CV-05-2343 and 79CV-01-247 (September 28, 1979), filed herein as State's Exh. E, p. 5.

There are no "executive findings of discrimination in state contracting opportunities," *Ritchey Produce*, 85 Ohio St.3d at 262, 707 N.E.2d at 919, in the materials cited by the Ohio Supreme Court. The only executive order referred to in *Ritchey Produce* is a 1972 order of Governor Gilligan which relates to equal opportunity in employment, not the award of state contracts. Likewise, this court has not found any administrative findings of

discrimination in the award of state contracts in the materials cited by the Ohio court.

There was no evidence of the number of MBEs in Ohio which were qualified to enter into contracts to sell goods and services to the state. Instead, there was only evidence of the total number of all minority-owned businesses in Ohio, eighty percent of which did not have even one employee and which included large numbers of sole proprietorships, such as barber shops, beauty shops, shoe repair shops, neighborhood carry-outs, and other "mom and pop"-type operations with no employees—businesses which would have neither interest in, nor ability to perform contracts to supply goods and services to the state of Ohio. There was no evidence of a "gross statistical disparity" between the number of qualified MBEs in Ohio and the contracts awarded to them. There was, in fact, no data on the percentage of all state purchasing contracts awarded to minority-owned firms. The Ohio Supreme Court relied on a statement in the 1978 report of the Attorney General's Task Force On Minorities In Business that minority businesses "received less than one-half of one percent of all state purchase contracts" from 1975 to 1977, and overlooked the fact that the data cited by the authors of the report did not include *all* state purchase contracts, but only Department of Transportation construction contracts.[1] *See* Section IV (e), *infra*.

The assertion that minority businesses constituted approximately seven percent of all Ohio businesses was

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[1]There [were] no data on the number of minority-owned firms which were qualified to undertake prime contracts for the construction of roads and bridges in the mid-1970s, but they were probably few in number. Perhaps they were in fact less than one-half of one percent of all such firms—if so, there would have been no disparity in the percentage of the contracts they received.

the result of a gross statistical error, also overlooked by Ohio's high court, in which the total number of Ohio minority-owned businesses, including those with and without employees, was compared with the total number of Ohio businesses with employees—a classic case of comparing apples to oranges. *See* Section IV (e), *infra*.

The ODAS and Legislative Budget Office ("LBO") studies cited by the court reported only the percentage of the dollar value of prime construction contracts awarded to minority-owned firms. They contained no information on the number of qualified minority-owned construction firms. These studies did not even attempt to show a disparity between the percentage of the contract dollars awarded to minority firms and the number of such firms.

Justice Douglas, speaking for all of the justices, except Justice Cook, who concurred only in the Court's judgment, assured the citizens of Ohio that the court's *Ritchey Produce* decision was based "upon a careful review of the state's arguments." *Ritchey Produce*, 85 Ohio St.3d at 254, 707 N.E.2d at 914. He called the above-described evidence a "wealth of evidence." *Id.* at 262, 707 N.E.2d at 919. Quite clearly, it is not. A careful analysis of the material referred to by the state court demonstrates, to the contrary, that it is wholly insufficient to support the state court's conclusion.

In *Ritchey Produce*, the Ohio Supreme Court called Ohio's MBE program a "benign or remedial race-based measure[.]" *Ritchey Produce*, 85 Ohio St.3d at 274, 707 N.E.2d at 928. The evidence in the instant case, however, revealed that far from being benign, this program, which was supposedly intended to remedy past discrimination against minority businesses, has instead become an instrument of reverse discrimination against non-minority businesses. The problem here begins with the fact that the set-aside goals of the Ohio MBE Act bear no

relationship to the number of minority businesses which are ready, willing, and able to enter into contracts with the state. In the present case, the state conceded that only those businesses with at least one employee would be likely to have the interest or ability to supply goods and services to the state of Ohio. Based on the census data available to the Ohio General Assembly in 1980, minority-owned businesses with at least one employee constituted only one percent of such Ohio businesses. Even this figure probably overstates the percentage of MBEs qualified to provide some of the services covered by the Act. For example, firms seeking prime construction contracts must be able to provide performance bonds. But, accepting this number as a hypothetical estimate of the availability of MBEs, it follows that the percentages set aside for them are at least five times what they should have been for prime construction, seven times what they should have been for construction subcontracting, and fully fifteen times what they should have been for other goods and services.

In order to achieve these unrealistic goals, state agencies have resorted to 100 percent set-asides in certain trades, services, and commodities, thereby completely excluding non-minority firms from the opportunity to sell their goods and services to these agencies. For example, for a number of years, it was the policy of The Ohio State University to reserve 100 percent of its painting contracts for minority firms. The University's list of categories of goods and services reserved solely for minority-owned firms was ultimately expanded to almost forty. For these tradesmen and businessmen, the University's policy was, "Whites and other non-minorities need not apply."

Even worse is the fact, revealed by the evidence in this case, that the state does not consider these unrealistically high goals as in any way limiting the percentage of state purchases to be set aside for minority-

owned businesses. In fact, the state has encouraged its purchasing departments to exceed those goals and, in many instances, they have done so.

Finally, it is sadly apparent that the assumption that dollars set aside for minority firms would flow to economically disadvantaged businesses is probably unfounded. A 1995 study of state affirmative action programs revealed that eighty percent of the dollar value of all contracts set aside for minority firms were awarded to only five percent of the MBEs registered in the program. Statewide, a mere handful of minority-owned businesses, about eighty firms, received eighty percent of the dollar value of the contracts set aside that year. In 1995, the state set aside 228.3 million dollars in state contracts for bidding by minority firms only and another fifty-six million dollars was set aside by the state's colleges and universities. In the instant case, Ohio's Department of Rehabilitation and Correction set aside a ten million dollar contract for the construction of an administration building at a new prison being built in Toledo, Ohio, and was prepared to award that contract to the Sherman R. Smoot Company, a minority-owned firm which is listed among the nation's 400 largest construction companies, with 1997 revenues reported in excess of 110 million dollars.

When financially rewarding state contracts are allocated on the basis of race, some business owner loses, not because her bid was too high or because he was less qualified, but because of the color of his or her skin. The loser, whether he be white or, as in the case of Mr. Ritchey, Lebanese, or whatever race he may be, may never in his lifetime have harbored a discriminatory thought. The economic needs of his business may be no less, or perhaps even much more than that of the business owner of the preferred race who receives the desired contract. It is precisely because this kind of an

affirmative action program places the burden of paying for past discrimination, not upon society as a whole, but upon individual business owners who may have never been guilty of discrimination, that such programs are disfavored by the courts. This is why the Supreme Court warned in Croson:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. . . .
>
> * * *
>
> Classifications based on a race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. . . .

Croson, 488 U.S. at 493.

In *Adarand*, Justice Thomas observed:

> . . . So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who

> believe that they have been wronged by the government's use of race. . . .

Adarand, 515 U.S. at 241.

Ohio's program of race-based quotas in state contracting is anything but benign.

II.

It is now well settled that all racial classifications imposed by federal, state, or local government must be analyzed under strict scrutiny; they must serve a compelling state interest and they must be "narrowly tailored" to serve that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In order to show a compelling state interest, the government actor must have a "strong basis in evidence for its conclusion that remedial action was necessary," *Croson*, 488 U.S. at 500. This requires evidence that the government actor itself was an active or passive participant in the discrimination. *See Croson*, 488 U.S. at 490-493.

Approximately two years after it became law, the constitutionality of the construction contract provisions of the Ohio MBE Act was challenged in an action filed in this court. *See Ohio Contractor's Ass'n v. Keip*, Case No. C-2-82-446 (S.D. Ohio, December 15, 1982). In *Keip*, the state of Ohio produced all of the evidence it had to show that the Act was supported by a compelling state interest to remedy the effects of past discrimination against minority contractors. Judge Kinneary reviewed and analyzed that evidence in a thirty-five page opinion. Although the law was then unsettled as to the standard of review, Judge Kinneary's legal analysis closely resembles the analysis the United States Supreme Court would later adopt, *i.e.*, strict scrutiny. *See, e.g., Adarand*;

Croson. He considered and applied the relevant elements of the "narrow tailoring" requirement of strict scrutiny, including duration, burden on non-minority contractors, flexibility, and consideration of less intrusive means. He found "scant support" for the existence of a compelling state interest to justify a race-based remedy. He concluded that regardless of the existence of a sufficient state interest, the Ohio MBE Act was, nevertheless, constitutionally defective because it was not reasonably tailored to the goal of remedying prior discrimination. *See Keip*, S.D. Ohio No. C-2-82-446, pp. 28-34. On appeal, the Sixth Circuit Court of Appeals, in a split decision, upheld the Ohio Act. *See Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167 (6th Cir. 1983). Judge Engle filed a strongly-worded dissent in that case. When the Sixth Circuit decided *Keip*, it applied the wrong standard of review. At that time, the court was applying a relaxed standard of review, an error which was corrected by the Supreme Court of the United States when it reversed the Sixth Circuit in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). In *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583, 587 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989), the appellate court acknowledged that it had applied the wrong standard of review in its earlier cases including, specifically, *Keip*. "The Supreme Court left no doubt that the standard of review previously employed by this circuit in racial and ethnic affirmative action cases was inappropriate." *Id.* at 588. *See also Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994).

The Ohio MBE Act of 1980 has [led] a charmed existence for nearly twenty years. It should have died in 1982 when Judge Kinneary found it unconstitutional in *Keip*, but it survived when the state appealed because the Sixth Circuit applied the wrong standard of review. Later, its supporters took courage when it received favorable mention in *Croson*. In *Croson*, Justice

O'Connor, speaking for the Court, rejected the proposition that a finding of disparity in the award of city construction contracts could be based on a disparity between the percentage of contracts awarded to minority firms and the percentage of the minority population of the city, noting that the city of Richmond "does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts." 488 U.S. at 502. She referred to *Keip*, 713 F.2d 167, noting that, in *Keip*, the Sixth Circuit had relied "on the percentage of minority *businesses* in the State compared to the percentage of state purchasing contracts awarded to minority firms. . . ." *Id.* (emphasis in original). It is not clear whether Justice O'Connor was saying this was sufficient, or simply that it was better than what the city of Richmond had done. In light of her statement that the city of Richmond did not even know how many firms in the relevant market were qualified to undertake public construction contracts, it is clear that she did not mean that a set-aside program for construction contracts could be supported by a disparity analysis based on all minority-owned businesses. If Justice O'Connor was suggesting that a set-aside program for other kinds of state purchasing could be supported by disparity between the number of minority-owned businesses and the percentage of state purchase contracts awarded to them, she certainly was not aware that the state of Ohio's calculation of the percentage of minority businesses in *Keip* was completely wrong. Ironically, the situation here is even worse than it was in *Croson*, where the city of Richmond attempted to justify a set-aside goal of thirty percent on the grounds that minorities constituted fifty percent of the city's population. Here, Ohio's goal of fifteen percent for goods and services is completely unexplained, but it does bear a rather suspicious correlation to the minority population of the state, which is about twelve percent of all Ohio citizens. Bureau of the Census, U.S. Dep't of Commerce, Pub. No.

1990 CP-1-37, 1990 Census of Population: General Population Characteristics, Ohio 37-27 (1992). So, in Richmond, a contracting goal which was twenty percentage points less than the city's minority population was struck down, while here, the state seeks to justify a set-aside which actually exceeds the percentage of the minority population of the state.

In the trial of the instant case, when the state was called upon to produce evidence of a compelling state interest, it announced that it would defend the constitutionality of the Ohio MBE Act on the basis of the record made in 1982, in the trial of *Keip*. The state conceded that it had no additional evidence of discrimination against minority contractors, and admitted that during the nearly two decades the Act has been in effect, it has made no effort to determine whether there is a continuing need for a race-based remedy. In the trial of this case, the state presented no evidence that it had been an active or passive participant in discrimination against minority firms in the award of prime construction contracts, or that it had participated directly or indirectly in discrimination by prime contractors in the award of subcontracts. Indeed, the state officials most likely to be aware of such discrimination, if it existed, said that to the best of their knowledge, there was none. The state relied entirely on the evidence which the General Assembly had in 1980, which is now over twenty years old and far too stale to support the continued existence of a program of race-based preferences.

After hearing the evidence in the case and after reviewing Judge Kinneary's analysis of the evidence the state produced almost seventeen years ago in the trial of *Keip*, the unconstitutionality of Ohio's MBE Act was so clear to this court that it declared the Act unconstitutional from the bench at the conclusion of its

October 1998 hearing. *See* Bench Decision October 28, 1998, Tr. 351-367.

III.

An analysis of *Ritchey Produce* should begin with these important observations: 1) the plaintiff never challenged the state's compelling interest for a race-based remedy; and 2) no trial was held in which the state was called upon to produce evidence to support a compelling interest for a race-based remedy. In *Ritchey Produce*, the plaintiff did not directly challenge the constitutionality of the set-aside program; instead, it sought to participate in the program. Ritchey Produce claimed that it was an economically disadvantaged business enterprise and that the Ohio statute should be interpreted broadly enough to benefit any business, regardless of race, which could show that it was economically disadvantaged. Ritchey Produce argued in the alternative that it was entitled to participate in the program because it was solely owned by a person of Lebanese descent, and that such persons are Orientals and entitled to the benefits of the program because of their race. Ritchey Produce never challenged the state's compelling interest to clothe the four classes of minorities mentioned in the statute with a presumption of economic disadvantage. In its brief in the Supreme Court of Ohio, Ritchey Produce said:

> . . . Ritchey Produce did not challenge the MBE statute's validity, but instead challenged how ODAS reversed its policy and decertified Ritchey Produce based on race *per se*. As the lower courts never considered either a record or arguments on the validity of the State's underlying interest in creating its MBE program, the State improperly raises these issues before this Court.

Merit Brief of Appellee Ritchey Produce Company, Inc., p. 9, Addendum C, filed herein April 14, 1999.

Nadin F. Ritchey, the sole shareholder of Ritchey Produce, is a naturalized American citizen who was born in the country of Lebanon. In 1990, he applied to the Ohio Department of Administrative Services ("ODAS") to have his business certified as a minority-owned enterprise. He indicated on his application that his company was an "Oriental" business. He was granted an MBE certificate and was awarded a two million dollar set-aside contract to supply fresh fruit and vegetables to state institutions. Ritchey's MBE certificate was renewed annually until 1995, when ODAS notified him that his application was rejected on the grounds that he was not a member of any group recognized as a minority business enterprise under Ohio Rev. Code §122.71(E)(1). Ritchey filed an administrative appeal asserting that anyone born in a country east of the Mediterranean should be considered Oriental. In the alternative, Ritchey argued that the agency's "reinterpretation" of the word "Oriental" should not be applied retroactively because this would unconstitutionally impair his existing contract with the state of Ohio. The hearing examiner rejected both of these arguments and Ritchey appealed to the Common Pleas Court of Franklin County. There, Ritchey conceded that he was not Oriental and argued instead that Ohio's set-aside program should be construed to benefit any business which can show that it is economically disadvantaged. He argued that §122.71(E)(1) merely created a rebuttable presumption that any business falling within the four specified racial classifications is economically disadvantaged. Ritchey's appeal was initially heard by a magistrate who agreed with his argument and also concluded that the Supreme Court's decision in *Adarand* required that the focus of the Ohio statute must be on economic disadvantage and not race

per se. *See* Appendix to Brief of Appellant State of Ohio, Addendum B, filed herein April 14, 1999. The state of Ohio filed objections to the magistrate's decision, causing it to be reviewed by Common Pleas Judge Daniel T. Hogan. Judge Hogan adopted and affirmed the magistrate's decision, agreeing that *Adarand* required that Ohio's MBE program should be open to any citizen, regardless of race, who could establish that his or her business was economically disadvantaged. *See* Appendix to Brief of Appellant State [**28] of Ohio, Addendum B, filed herein April 14, 1999. The state appealed Judge Hogan's decision to the Franklin County Court of Appeals. The court of appeals, like the court below, did not address the issue of whether the state had shown a compelling state interest to justify its set-aside program. Agreeing with Judge Hogan, the court of appeals held that the program was not "narrowly tailored." The court of appeals reasoned that the statute was both under-inclusive and over-inclusive because there may be economically disadvantaged businesses which are excluded simply because of their race, while at the same time others which are not economically disadvantaged are eligible to participate because of their race. *See* Appendix to Brief of Appellant State of Ohio, Addendum B, filed herein April 14, 1999.

Because Ritchey conceded that the state of Ohio had a compelling interest to grant race-based preferences to the four specified minorities, the state was not called upon to present any evidence to support its set-aside program. As a result, there was no evidentiary record which the Supreme Court of Ohio could review to determine whether the state had demonstrated a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 510 (quoting *Wygant*, 476 U.S. 267 at 277). When the state appealed to the Supreme Court of Ohio, that court had several options available to it. Like the lower courts, it could have

limited its decision to the interpretation of Ohio's MBE Act and the "narrowly tailored" element of strict scrutiny, particularly whether *Adarand* required all affirmative action plans to be based on economic disadvantage. The Ohio Supreme Court's rulings that Ohio's MBE Act was based on race *per se* and that *Adarand* did not prohibit a race-conscious remedial program would have resolved all of the issues raised by Ritchey Produce. Thus, the court could have deferred consideration of the crucial issue of whether the state had a compelling interest for a race-based remedy until it had a litigant before it who was effectively advocating the interests of Ohio's non-minority businesses by challenging the state's evidence of a compelling interest. On the other hand, if the court felt that it was necessary to decide the issue of compelling state interest, it had a second option, namely to remand the case to the trial court for a trial in which the state would be called upon to produce its evidence of a compelling state interest.

The Ohio Supreme Court did not exercise either of these options. Instead, it undertook to decide whether Ohio's program of race-based preferences in state contracting was supported by a compelling state interest. In the absence of an evidentiary record, it undertook to decide this issue by examining historical information it was able to glean from the state's briefs. Thus, Ohio's high court based its decision, not on a factual record developed in an adversarial hearing, but on information it gathered from the state's briefs.[2] This approach cannot

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[2]Justice Douglas, speaking for the Ohio Supreme Court, with the exception of Justice Cook, who concurred in the judgment only, stated:

> Indeed, *upon a careful review of the state's arguments in this case*, it clear [sic] to us that the General Assembly had a "strong basis" in evidence to support its conclusion that Ohio's

be reconciled with the requirement of strict scrutiny. As Justice Powell said in *Wygant*:

> Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court. . . . In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with [the plaintiff] to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination. . . .

Wygant, 476 U.S. at 277-278. *See Brunet*, 1 F.3d at 405 ("The District Court did not err in placing a burden of production upon the City and the . . . plaintiffs to show evidence of past discrimination[.]"). *See also Aiken*, 37 F.3d at 1162 ("The party defending the plan bears the burden of producing evidence that the plan is constitutional.")

> program was necessary to redress a pattern of discriminatory exclusion of minorities from state contracting opportunities and, thus, had a compelling governmental interest for adopting the MBE program.

Ritchey Produce, 85 Ohio St.3d at 254, 707 N.E.2d at 914 (emphasis added).

IV.

In *Ritchey Produce*, the Supreme Court of Ohio found that the state "had a 'strong basis in evidence' for finding that remedial action was necessary to ameliorate the effects of identified racial discrimination in which the state itself had either actively or passively participated." *Ritchey Produce*, 85 Ohio St.3d at 260, 707 N.E.2d at 918. The "evidence" the court relied upon in reaching this conclusion consisted of two court decisions, statistical information, a January 1972 executive order issued by Ohio Governor, John J. Gilligan, and a 1978 report by a Task Force On Minorities In Business, established by Ohio Attorney General, William J. Brown.

a) *Ethridge v. Rhodes*

The first court decision the Ohio Supreme Court relied upon was *Ethridge v. Rhodes*, 268 F.Supp. 83 (S.D. Ohio 1967). *Ethridge* was a class action brought on behalf of black construction workers who had been denied admittance to labor unions for the construction trades. Plaintiffs sought to enjoin the state of Ohio from entering into construction contracts with companies which limited their hiring to members of unions which had excluded blacks. The court found that the state was aware of a pattern of discrimination by the unions in membership and referral of black tradesmen, and that the state was aware that its efforts to eliminate this discrimination had been ineffectual. The court found that the state had become a joint participant in a pattern of racially discriminatory conduct "by placing itself in a position of interdependence with private individuals . . . acting under contract with unions that bar Negroes. . . ." *Id.* at 87.

Ethridge may be relevant as corroborative evidence of the state's role as a passive participant in discrimination against blacks, but it is not probative on

the issue of whether the state had discriminated against minority-owned firms in the award of state construction contracts. *Ethridge* involved discriminatory membership practices of labor unions, not the award of state construction contracts. While it might be argued that discrimination by labor unions may have contributed to a paucity of black construction firms in the 1970s, the Supreme Court of the United States has held that speculation about the results of past societal discrimination may not be used to justify race-based preferences in the award of public contracts. *See Croson*, 488 U.S. at 499.

b) Governor Gilligan's Executive Order

In January 1972, Ohio's then governor, John J. Gilligan, issued an executive order directing all state agencies to eliminate discriminatory barriers to employment. This executive order was directed against employment discrimination by contractors performing public works contracts for the state of Ohio, and was apparently issued to fulfill the requirements of a preliminary consent order entered as part of the settlement of the case of *Welch v. Rhodes*, Civil No. 67-249 (S.D. Ohio 1967), which sought to expand the injunction entered in *Ethridge*. In *Ritchey Produce*, the Supreme Court of Ohio stated that "the purpose of this order was, among other things, to increase minority participation in state contracting opportunities." *Ritchey Produce*, 85 Ohio St.3d at 255, 707 N.E.2d at 915. This is true only in the sense that the order sought to increase the hiring of minorities by firms engaged in state contracting. The order says nothing about the award of state construction contracts. It contains no findings that the state had discriminated in the award of construction contracts. Indeed, it is completely silent on that issue. Thus, Governor Gilligan's Executive Order of January 27, 1972, like the decision in *Ethridge*, has no probative value on

the issue of whether the state of Ohio had a compelling interest to remedy discrimination in the award of state construction contracts.

There is a further reference to Governor Gilligan in *Ritchey Produce*. The court noted that Governor Gilligan had testified in the trial of *Keip*, where he said that, during his administration, he was aware of the difficulties experienced by minority businesses and small businesses in obtaining state contracts, and that the cause of the difficulty was "the existence of 'an old boys' club sort of relationship' between state officials and a number of established and reputable firms with a good deal of experience that 'tended to get the lion's share of the business.'" *Ritchey Produce*, 85 Ohio St.3d at 256, 707 N.E.2d at 915. However, Judge Kinneary's opinion in *Keip* further states that "based on his responses to questioning at trial, Governor Gilligan was not aware of, nor did he cause any investigation into, allegations that state officials discriminated against minority contractors during his administration." *Keip*, S.D. Ohio No. C-2-82-446, p. 11.[3]

c) *Ohio Building Chapter, AGC v. Jackson*

The second court decision relied upon in *Ritchey Produce* was *Ohio Building Chapter, AGC*, which arose out of a legal challenge to minority set-aside provisions contained in a biennial capital improvements appropriation bill passed by the Ohio General Assembly in September 1977. This bill contained no findings that the state had discriminated against minority contractors. In an unreported decision, Common Pleas Judge George

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[3]Governor Gilligan's testimony in Keip was given in October, 1982. There is no evidence that he provided any testimony to the Ohio Legislature during its deliberations which culminated in the enactment of Ohio's set-aside program in 1980.

Tyack upheld the constitutionality of the bill. Judge Tyack did not render separate findings of fact and conclusions of law. A transcript of the testimony and other evidence he relied upon is no longer available. In a six-page decision, Judge Tyack's only reference to discrimination in the award of state contracts was one cryptic sentence:

> This court finds from the evidence submitted that there exists in the awarding of state contracts a discrimination against the minority groups specified in Sub House Bill No. 618.

Ohio Building Chapter, AGC, Franklin C.P. Nos. 78CV-05-2343 and 79CV-01-247, filed herein as State's Exh. E. Judge Tyack's decision was handed down on September 28, 1979, one day before the expiration of the biennial appropriation which contained the challenged set-aside provisions. Not surprisingly, there was no appeal.

It is impossible to determine from Judge Tyack's decision what evidence he relied upon or just what he meant when he said "there exists . . . a discrimination." He did not identify the discriminator or discriminators. It is particularly significant that he did not make an express finding that the state of Ohio was a participant in the discrimination.

Although there is no transcript of the evidence adduced in *Ohio Building Chapter, AGC*, the briefs filed by the parties are available and they do shed some light on what the evidence was. In a section of the plaintiff's brief entitled "The Facts," the following statements appear:

> The Department of Administrative Services admists [sic] that it maintains no

records with respect to the race, sex, or ethnic backgrounds of those who submit bids for construction contracts. Nor does it have any records with respect to the owners of the stock when the bidder is a corporation.

* * *

Although there is some evidence that employees of the Department of Administrative Services know relatively few Minority Business Enterprises who have successfully competed for public contracts, there has been an abundance of evidence that most contractors who qualify as MBEs are relatively small and lack the financial resources necessary to compete and perform state jobs. Financial resources are necessary because the contractor must bear the cost of labor and materials for at least 30 days and must provide the statutory bonds. These same factors affect most contractors who are not MBEs from competing and performing state work.

There has been no evidence of prior discrimination by the state against contractors who qualify as MBEs.

The defendant has not even attempted to show "a compelling governmental interest for classification" except for blacks. The evidence falls far short of what is required to show a compelling interest there for [sic] it has focused on problems with labor unions and employment, not with black contractors being denied the right to bid by the state.

Brief of Plaintiffs, Franklin C.P. Nos. 78CV-05-2343 and 79CV-01-247, filed herein as Defendant State of Ohio Third Submission of Materials, Addendum K, Item 10, pp. 2-3. The state's case on the issue of the constitutionality of the set-aside provisions of the bill was presented by special counsel, Otto Beatty, Jr. In his brief, Mr. Beatty did not challenge the plaintiff's characterization of the evidence before the court as quoted above. His own summary of the evidence was as follows:

> Plaintiff will not deny that minority business enterprises engaged in construction contracting (that is, the open class who are beneficiaries of Defendants [sic] actions now before the Court) receive now, and have received in the past, little or no business from the state. This is further evidenced by the statistics and data prepared by Mr. Burton D. Cooper, EEO Program Supervisor for the Department of Administrative Services and submitted as Defendant's Exhibits K-1, K-2, K-3, K-4, K-5, L, M, N, O, and P. Plaintiffs cannot deny that these minority businesses have in the past been, and are still today, victims of direct and indirect invidious discrimination. This discrimination may have been part of a general, diffused commercial and societal pattern of discrimination. Nevertheless, such discrimination is in direct contradiction to the spirit, language, and policy of the laws of Ohio.

Supplemental Brief of Special Counsel, Franklin C.P. Nos. 78CV-05-2343 and 79CV-01-247, Defendant State of Ohio Third Submission of Materials, Addendum K, Item 11, pp. 3-4. Mr. Beatty continued, as follows:

> Defendants have already shown in testimony and documentary evidence presented before the Court, that the numbers of minorities in the construction trades in the State of Ohio has been, and is exceedingly low. Furthermore, defendants have shown that this dilemma was not due to a lack of qualified minorities but rather to technical discriminatory road blocks such as inability to obtain surety bonds and contracts, which effectively closed employment opportunities to minority contractors. . . .

Supplemental Brief of Special Counsel, *supra*, p. 16. At page 19 of his brief, Mr. Beatty argued as follows:

> The plaintiffs would have the Court to believe that the state's affirmative action – Set Aside Program cannot be justified by any need to overcome past discrimination because the State of Ohio has not been found to have engaged in discrimination. That proposition is erroneous for two reasons: first, the State is not limited to correcting the effects of its own discrimination, but it can take into account the consequences of discrimination elsewhere in society; second, institutions or governmental bodies need not await judicial determinations before attempting to overcome their own discrimination.
>
> It would make no sense to conclude that the State can take race or gender into account only to compensate for its own discrimination. Although in some cases a remedy may be needed to break down a discriminatory pattern in the

> administration and award of a state's public works program, whether the State previously practiced discrimination of this sort is not a necessary part of the justification for a special affirmative action or set-aside program.

Supplemental Brief of Special Counsel, *supra*, pp. 19-20. The briefs of counsel are just as instructive for what they do not say as they are for what they do say. They do not refer to any anecdotal evidence of discrimination by state contracting officers, or by any prime contractors, banks, or lending companies. They do not refer to any disparity studies which undertook to determine the number of minority firms qualified to perform state construction contracts, what percentage they were of all such firms, and how that number compared to the percentage of state construction contracts they received. Mr. Beatty's brief refers only to the fact that minority-owned businesses had received little or no business from the state, and that the number of minorities in the construction trades in Ohio was "exceedingly low." He argues that these firms were the victims of unspecified "direct and indirect invidious discrimination" which was "part of a general, diffused commercial and societal pattern of discrimination," and "technical discriminatory road blocks such as inability to obtain surety bonds and contracts." Supplemental Brief of Special Counsel, *supra*, pp. 3-4, 16.

The statistical evidence presented in *Ohio Building Chapter, AGC*, was reviewed by Judge Kinneary during the *Keip* trial. *See Keip*, S.D. Ohio No. C-2-82-446, pp. 15-16. The Supreme Court of Ohio relied upon Judge Kinneary's summary of this evidence. *See Ritchey Produce*, 85 Ohio St.3d at 255, 707 N.E.2d at 915. The statistical evidence was compiled and presented by Burton Cooper, an Equal Employment Opportunity ("EEO") program supervisor with the Department of

Administrative Services. Cooper's statistics indicated that, during the twenty-two year period from 1957 to 1979, minority contractors were awarded roughly 0.21 percent of the dollar amount of certain categories of prime capital improvement contracts. While Cooper's calculations showed that minority contractors obtained a very small portion of these contracts, he did not determine the number of minority firms who were ready, willing, and able to perform such contracts, or what percent of the total number of all such firms they represented. Without this information, it would be impossible to say whether minority firms received more or less than their fair share of the contracts. Burton's calculations represent only the first step in a statistical analysis of possible discrimination in the award of state prime capital improvement construction contracts. Standing alone, they have no probative value on the issue of discrimination in the award of such contracts.

From the above analysis, it is apparent that *Ohio Building Chapter, AGC* was tried on the theory that a program of race-based benefits could be supported by evidence that minorities had received only a small percentage of state contracts, that minority firms were disadvantaged as a result of past societal discrimination, and that it was not necessary to show that the state was a participant in the discrimination. The law was not settled when *Ohio Building Chapter, AGC* was tried. Indeed, the United States Court of Appeals for the Sixth Circuit was incorrectly applying a relaxed standard of review to race-based remedies until 1986 when the Supreme Court of the United States reversed the Sixth Circuit in *Wygant*. The evidence offered in *Ohio Building Chapter, AGC* would not satisfy the requirements of strict scrutiny, and Judge Tyack's 1979 decision has little or no probative value.

d) 1978 Report of the Ohio Attorney General's Task Force on Minorities in Business

In 1978, Ohio Attorney General William J. Brown established a Task Force On Minorities In Business to examine the relationship between state government and minority business. The task force was directed to review state laws, practices, and services relating to minority-owned businesses, and to recommend legislative, administrative, and fiscal measures to enhance assistance to small businesses in general and to minority-owned businesses in particular. In October 1978, the task force issued its final report. The task force report contains various findings concerning the problems faced by small businesses in general, and minority businesses in particular. Under the heading "Capital Formation and Financing," the report states:

> . . . Minority entrepreneurs often enter their business ventures with limited, if any, equity. As a result, these business owners must seek financing from alternate funding sources to sustain their business activities. However, the Task Force found that there are no effective financing sources available for Ohio minority businesses.
>
> Banking institutions are the traditional source of business borrowing. Banks prefer to lend funds for short term use to an enterprise which has an established earnings record or is fully collateralized by assets which are easily converted into cash. On the other hand, the typical credit needs of a minority business are for long term, low cost, unsecured or inadequately secured financing. As a consequence, the requirements and needs of

> the banking industry and the minority entrepreneur are usually incompatible—and minority businesses have been unable to secure a significant number of bank loans.

Attorney General of Ohio Task Force Report: Final Report (hereinafter "Final Report"), filed herein as State's Exh. F, pp. 8-9.

* * *

> Opportunities for minority businesses to broaden their markets are frustrated by such problems as their non-competitive size, lack of capital and inexperience.

Final Report, p. 13.

* * *

> The public hearing testimony indicated that minority entrepreneurs are faced with the unique problems of minority businesses as well as traditional problems which befall most small businesses. Many minority businesses are located in the high crime, high unemployment and low income urban areas of the State. These factors lead to uncertain and unstable business environments.

Final Report, p. 15.

The task force reviewed state contract procurement statistics and procedures and reported that:

> . . . Statistics reveal that minority businesses received less than one-half of one percent (.5%) of all State purchase contracts from 1975 to 1977; yet seven percent (7%) of Ohio businesses are classified as minority. Ohio minority businesses are receiving less than one-fourteenth (1/14) of their proportionate share of State contracts.

Final Report, p. 17.

Noting that state contracts are awarded to the bidder who submits the "lowest and best bid" the task force recommended that the standard be changed to "lowest, best, and most responsive" to permit "an even greater latitude in the employment of relevant contract award criteria other than price." Final Report, p. 17. The task force also recommended that the dollar limit on non-competitive bidding be raised from $300 to $5,000, in order to increase minority business participation. Final Report, p. 18.

The task force pointed to public hearing testimony which indicated that "[m]ost black businessmen don't have the knowledge . . . to know where to go to find [State] contracts." Final Report, p. 18. The task force concluded:

> This lack of knowledge concerning the availability of State contracts is a factor which contributes to the low contract procurement percentages reflected in minority business statistics. . . .

Final Report, p. 18.

In the realm of bidding procedures, the task force concluded that the state should alter its means of preparing contract specifications by breaking contracts down "into smaller, multiple sizes." Final Report, p. 19.

In the area of bonding, the task force found:

> In order to procure a state contract, one must be able to acquire bonding, an insurance against contract failure. As a result, if one is unable to secure bonding, this individual is also unable to secure a State contract. Minority businesses have faced severe difficulties in obtaining bonding. . . .
>
> * * *
>
> Four major problem areas which contribute to the inability of the minority contractor to secure bonding are:
>
> 1) unsatisfactory financial statements
> 2) improper estimating techniques
> 3) creditor liens (claims on the property of a contractor)
> 4) lack of knowledge of the total bonding process.
>
> The above cited conditions are typical problems which cause the surety industry to deny bonding to minority businesses.
>
> In addition, the extensive and complex paperwork which must be processed in order to acquire bonding presents problems for the minority entrepreneur. One witness stated that there are approximately sixteen different forms which must be completed before a

> business person can acquire a bond. Many minority entrepreneurs do not have the technical expertise and managerial skills to complete this paperwork.

Final Report, pp. 19, 20.

The task force recommended that the state establish a program to offer bonds and bonding technical assistance to minority entrepreneurs, and that the state adopt a statutory enforcement mechanism to guarantee equal bonding policies.

In the realm of capital acquisition, equity and debt, the task force found that "small minority businesses are often unable to bring together sufficient financial resources due to the lack of an established earnings track record and business credibility." Final Report, p. 23. The task force final report states:

> The public hearing record indicates that minority businesses have been unable to successfully secure a significant number of bank loans. Numerous witnesses testified that they believed that the minority entrepreneur's inability to acquire bank loans was due to the banking industry's discriminatory lending practices. In rebuttal, witnesses from banking institutions denied that Ohio bankers engaged in discriminatory practices. Bank representatives asserted that because their primary public responsibility must be to safeguard the funds of their depositors, they do not extend substantial lines of credit unless there is a high probability that the credit will be repaid in a relatively short period of time.

> Optimally, a banker would prefer to lend funds for short term use to an enterprise which has an established earnings record and is fully collateralized by assets which are easily converted into cash. On the other hand, the typical credit needs of a minority business person are for long term, low cost, unsecured or inadequately secured financing. These inconsistent requirements and needs, between the banking industry and the minority entrepreneur, cause banking institutions to be an inadequate and illusory source of financing for minority business.

Final Report, p. 24. The task force recommended that the state of Ohio create an agency which would be able to make long-term direct loans to minority business enterprises and guarantee long-term loans by banks and other financial institutions to minority business enterprises.

The Attorney General's task force appears to have conducted a serious and thorough study of the problems facing small and minority businesses in Ohio in the 1970s. While it identified a variety of obstacles to the success of minority businesses, its report is devoid of any findings that racial discrimination played a role in the inability of minority businesses to obtain a larger share of state contracts.

e) Statistical Information

The statistical evidence of discrimination the Ohio Supreme Court relied upon to uphold the Ohio MBE Act consisted of:

1. Data prepared by ODAS for the defense of *Ohio Building Chapter, AGC v. Jackson*;

2. Data compiled by the Legislative Budget Office;

3. Disparity calculations extracted from *Keip* and the 1978 report of the Attorney General's Task Force On Minorities In Business.

See Ritchey Produce, 85 Ohio St.3d at 257-58, 707 N.E.2d at 916-17.

1. Data prepared by ODAS for the defense of *Ohio Building Chapter, AGC v. Jackson*

The statistical data which the state offered in defense of the temporary set-aside program challenged in *Ohio Building Chapter, AGC* was prepared in 1978 by Burton D. Cooper, EEO Program Supervisor for ODAS. *Keip*, S.D. Ohio No. C-2-82-446, p. 15. Cooper compiled records from the State Architect's Office of five categories of capital improvement contracts awarded by the state from 1957 to 1979. *Id.* He sought to determine the portion of such contracts that were awarded to MBEs. However, ODAS did not have records of the race or ethnic background of the firms that submitted bids for construction contracts. In an attempt to determine which firms were minority-owned, Cooper consulted a roster of minority contractors which ODAS had started keeping in 1976, and he asked for names of known minority firms from unofficial sources such as the Urban League and NAACP. *Id.* at p. 15 n.10. Cooper calculated the dollar value of all of the contracts awarded in the five categories during the twenty-two year period and determined that

identifiable minority firms received roughly 0.21 percent of that amount.

Cooper's calculations have some obvious limitations. First, they do not represent all prime construction contracts awarded by ODAS during the years in question; instead, they represent only those in the five categories he selected. Second, although his calculations covered a period of twenty-two years, official records on the identity of minority-owned firms were kept only during the last three years of the period he studied. The identity and number of minority-owned firms in the 1950s and 1960s was unknown. Some of Cooper's data was twenty years old when he compiled it, far too stale to support a finding of present discrimination.

There is no indication that Cooper ever attempted to determine the number of minority-owned construction firms that were ready, willing, and able to enter into prime construction contracts with the state, or what percentage they represented of the total number of such firms. Thus, the percentage of prime capital improvement contracts awarded to identifiable MBEs is meaningless. Without data on the availability of minority-owned firms, it is impossible to say whether they received more or less than their proportionate share of those contracts.

Finally, Cooper did not attempt to calculate the amount of state construction dollars which flowed to minority-owned subcontractors during the period studied.

2. The Legislative Budget Office Data

The statistical information compiled by the Legislative Budget Office ("LBO") resulted from a "small scale" investigation of minority participation in state construction which was done in 1977 at the request of

Representative C.J. McLin. *Keip*, S.D. Ohio No. C-2-82-446, p. 16. The investigation was limited to a study of Department of Transportation prime construction contracts for the years 1975, 1976 and 1977. *Id.* These figures showed minority participation to be 0.13 percent, 0.3 percent, and 0.18 percent for the three years respectively. *Id.* The data did not include any information on the number of MBE firms ready, willing, and able to perform road construction work for the state of Ohio, or what percentage they represented of the total number of such firms. It did not include any information on subcontracting.

3. Calculations based on 1972 census data reported in *Keip* and the Attorney General's Task Force on Minorities in Business

The report of the Attorney General's Task Force on Minorities in Business states:

> Statistics reveal that minority businesses received less than one-half of one percent (.5%) of all State purchase contracts from 1975 to 1977; yet seven percent (7%) of Ohio businesses are classified as minority.

Final Report, p. 17.

The report, at page 17 note 2, cites the LBO data as the source for the percentage of *all* state purchase contracts awarded to minority businesses, but the LBO study related only to construction contracts awarded by the Department of Transportation. *See Keip*, S.D. Ohio No. C-2-82-446, p. 16. Thus, the report misrepresents the data, transforming a calculation of the percentage of Department of Transportation construction contracts into the percentage of *all* state purchase contracts. The Supreme Court of Ohio accepted and relied upon this

misstatement of the data. In fact, it does not appear that the state had any data on minority businesses' share of all state purchase contracts, data which was absolutely essential to any finding of disparity in the award of such contracts.

The report cites 1972 Census Bureau statistics as the source of the percentage of minority-owned business in Ohio. It is apparent that the state relied on the same information seventeen years ago in the trial of *Keip*.

> These statistics [the ODAS and LBO studies] were available to the General Assembly when it was considering Am. Sub. H.B. 584, as were U.S. Department of Commerce statistics indicating that minority businesses constituted approximately 6.7 percent of the total number of Ohio business enterprises.

Keip, S.D. Ohio No. C-2-82-446, p. 16. *See also* Final Report, p. 13.

In *Ritchey Produce*, the Supreme Court of Ohio relied on the 1972 census data which it gleaned from Judge Kinneary's decision in *Keip*, 85 Ohio St.3d at 258, 707 N.E.2d 871 at 916 ("...minority businesses represented approximately 6.7 percent of the total number of Ohio businesses.") (citing *Keip*, S.D. Ohio No. C-2-82-446, pp. 15-16), and from the report of the Attorney General's task force on minorities, 85 Ohio St.3d at 258, 707 N.E.2d at 917 ("...minority-owned businesses accounted for approximately seven percent of all Ohio businesses.") (citing Final Report).

The 1972 census data, published by the U.S. Department of Commerce, includes a Bureau of the Census special report entitled "1972 Survey Of Minority-

Owned Business Enterprises," as well as reports on all businesses, regardless of race or ethnicity, which are published for each state under the title "County Business Patterns 1972." These are public documents of which a court may take judicial notice. *See Mitchell v. Rose*, 570 F.2d 129, 132 n.2 (6th Cir. 1978), *cert. granted*, 439 U.S. 816 (1978), *rev'd on other grounds*, 443 U.S. 545 (1979). They are available at any public library. *See* Appendix A to this Opinion and Order.

The 1972 survey of minority-owned business enterprises indicates that in 1972 there were a total of 11,877 minority-owned businesses in Ohio. This is approximately the number reported in the report of the Attorney General's task force. *See* Final Report, p. 13 (reporting 11,183 minority-owned businesses). This number includes all minority-owned firms, both those with employees and those without employees. Over eighty percent of these firms (9,895 firms) did not have employees. The 1972 census data available for the total number of all business enterprises in Ohio was the total number of firms *with* employees: 165,732. The report of the Attorney General's task force rounds this number up to 166,000. Final Report, p. 13. It is apparent that the calculations of the percentage of minority-owned firms in Ohio which the Ohio Supreme Court relied upon in *Ritchey Produce* were based on these numbers (11,183 is 6.7 percent of 166,000; and 11,877 is 7 percent of 165,732). It is also apparent that these calculations are a classic case of comparing apples to oranges. The total number of all minority-owned firms with and without employees was compared with the total number of all firms with employees. This calculation yields a number which is completely useless for determining whether minority-owned firms received a proportionate share of state purchasing contracts. Yet, these calculations were the ones relied upon by the Supreme Court of Ohio in upholding the Ohio MBE Act. This shows the folly of

attempting to determine whether the state had a firm basis in evidence for a remedial program of race-based preferences in a case where the only "evidence" available was the arguments in the state's briefs.

The statistical evidence the court relied upon was fatally flawed and formed no basis for a finding that minority-owned firms received less than their proportionate share of state contracts. The relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. In the case of a set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. Dr. Merelyn Bates-Mims, Deputy Director of the Department of Administrative Services, Equal Opportunity Division, testified in the October 1998 hearing before this court that the total universe of Ohio minority business enterprises would include:

> carryout [sic] shops and beauty shops and the kinds of things, kinds of small businesses that you regularly find in minority communities which may not at all be interested or able to take advantage of the large volume kinds of contracts that are available in a state procurement opportunity.
>
> * * *
>
> . . . and so there are many, many small very, very, very small, one-person show kind of operations in minority communities. I don't know what percentage make up that 22,000 of those kinds of businesses.

Associated General Contractors of America v. Drabik, Trial Transcript, pp. 144, 145. In her testimony, Dr. Bates-Mims was referring to 1990 census data on the number of minority businesses in Ohio. Justice O'Connor, speaking for the Court, said in *Croson*:

> There is no doubt that "where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. But it is equally clear that "when special qualifications are required to fill particular jobs, comparison to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."
>
> * * *
>
> In this case, the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects.

Croson, 488 U.S. at 501, 502. Special qualifications were and are necessary to bid on prime construction contracts for the state of Ohio. As the 1978 report of the Ohio Attorney General's Task Force On Minorities In Business explained, those qualifications include adequate capital, credit, and the ability to obtain bonding. Here, as in *Croson*, the state did not know how many MBEs in the relevant market were qualified to undertake prime or subcontracting work in public construction projects.

Since at least the turn of the century, Ohio law has required that contracts for public works be awarded on the basis of competitive bidding. *See Carmichael v. McCourt*, 6 CC(NS) 561, 17 CD 775 (1905). Section 123.15 of the Ohio Revised Code provides that, except in cases of extreme public exigency or emergency, any contract for the performance of labor, furnishing of materials, or the construction of any structures or buildings in excess of $500 must be advertised in a newspaper of general circulation in or contiguous to the county where the contract is to be let, and where the work is to be performed, and that "such contracts shall be awarded to the lowest responsive and responsible bidder. . . ." If the state awards a contract to a firm that did not submit the lowest bid, it can be and often is sued by the lowest bidder. The courts of Ohio have not hesitated to grant appropriate relief where the disappointed bidder can show that it was the lowest responsive and responsible bidder. Thus, any MBE who was the lowest responsive and responsible bidder on a state construction contract could seek immediate relief in an Ohio court.

It is also the policy of the state to require competitive bidding in the award of contracts for the purchase of non-construction goods and services. Although the policy varies somewhat from agency to agency, in general it is the rule that purchases between $300 and $2,000 are informally bid competitively by such means as seeking telephone bids from three registered vendors, or mailing bids to a selected number of registered vendors with formal competitive bidding for purchases in excess of $2,000, wherein bid requests are mailed to all vendors registered for the products or services. *See* Final Report, p. 18.

Since state contracts are awarded on the basis of competitive bidding, overt discrimination in the award of

contracts by state officials should be relatively easy to detect and remedy. There is little or no opportunity for the kind of subjective decision making which can mask intentional discrimination. Indeed, ironically, one of the suggestions made in the October 1978 Final Report of the Ohio Attorney General's Task Force On Minorities In Business was to increase the opportunity for subjective decision making in the award of state contracts so that state contracting officials would have the discretion to award more contracts to minority firms. *See* Final Report, p. 17. This is not to say that such a system is impervious to manipulation, but it does suggest that proof that the state itself is discriminating in the award of such contracts would require some evidence that competitive bidding requirements were being ignored or circumvented. No such evidence was offered in the instant case and no such evidence was mentioned in *Ritchey Produce*.

In the foregoing discussion, this court has examined all of the information which the Supreme Court of Ohio relied upon to uphold Ohio's set-aside program in state purchasing. In *Ritchey Produce*, the Supreme Court of Ohio referred to this evidence variously as "a wealth of evidence," 85 Ohio St.3d at 262, 707 N.E.2d at 919, and "a vast array of statistical evidence," 85 Ohio St.3d at 261, 707 N.E.2d at 919, and concluded that the General Assembly had a "'strong basis' in evidence to support its conclusion that Ohio's program was necessary to redress a pattern of discriminatory exclusion of minorities from state contracting opportunities . . . ," 85 Ohio St.3d at 254, 707 N.E.2d at 914. This court respectfully disagrees. In 1980, when the Ohio General Assembly adopted its minority set-aside program, the evidence that minority firms had received less than their fair share of state contracts because of a pattern of racial discrimination in which the state was an active or passive participant was, in the judgment of this court, non-existent. This court

does not believe that, by any stretch of the imagination, it can be said that this evidence satisfies the requirement which the Supreme Court of the United States established in *Wygant*, 476 U.S. at 277, and reiterated in *Croson*, 488 U.S. at 500, that race-based remedies must be supported by a "strong basis in evidence for [the] conclusion that remedial action was necessary."

In order to support a compelling state interest for race-based preferences, the evidence of past discrimination must be reasonably current. Where evidence is "too remote to support a compelling governmental interest to justify the affirmative action plan," it must be struck down. *Brunet*, 1 F.3d at 409. In *Brunet*, the court found that fourteen-year-old evidence of discrimination was too remote. *Id.* at 409. In *Hammon v. Barry*, 264 U.S. App. D.C. 1, 826 F.2d 73, 76-77 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia Circuit found that discriminatory conduct occurring eighteen years prior to the institution of an affirmative action plan was insufficient to justify the plan. In *Detroit Police Officers Association v. Young*, 989 F.2d 225, 228 (6th Cir. 1993), the Court of Appeals for the Sixth Circuit terminated a nineteen-year-old affirmative action plan because "it no longer serves the same compelling state interests as it once did under the changed circumstances of almost two decades."

In *Ritchey Produce*, the Supreme Court of Ohio found that Ohio had a compelling interest for granting race-based preferences in state contracting, relying on twenty-year-old historical information it took from the state's briefs. Ohio's high court seems to have been entirely oblivious to the age of the "evidence" it relied on. Information which is over two decades old can not form the basis for a compelling state interest to redress past discrimination.

V.

The second branch of the strict scrutiny analysis is whether the program at issue is "narrowly tailored." In *United States v. Paradise*, 480 U.S. 149, 171, (1987) (citing *Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 481 (1986)), the Court identified four factors to be considered in determining whether race-conscious remedies are appropriate: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief . . .; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."

a) Consideration of race-neutral alternatives

In *Croson*, the Court held that the Richmond plan failed the "narrowly tailored" test because the city did not give any consideration to the use of race-neutral means to increase minority business participation in city contracting. *Croson*, 488 U.S. at 507. The Court noted that:

> Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If MBE's disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, a *fortiori*, lead to greater minority participation.

Id.

In *Ritchey Produce*, the Supreme Court of Ohio found that: "Ohio's MBE program was enacted only after

a host of earlier efforts designed to increase minority participation in state contracting opportunities had failed to eliminate the effects of racial discrimination in the area of state contracting." 85 Ohio St.3d at 267, 707 N.E.2d at 923. In so finding, the court referred to Part IV of its opinion, wherein it enumerated the historical information concerning the evidence of discrimination possessed by the Ohio General Assembly when it enacted the 1980 MBE Act, and which this court has examined and described in detail. Far from finding a "host of earlier efforts to increase minority participation in state contracting opportunities[,]" this court found in the materials cited by the Ohio Supreme Court only one, to wit: the provisions of the biennial appropriation bill challenged in *Ohio Chapter, AGC*, a limited race-conscious program which lasted only two years.

This court has been unable to find any evidence in the historical record that the Ohio General Assembly gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. The Supreme Court of Ohio referred to the failure of various methods, such as goals set by executive orders and administrative regulations. *Id.* at 267-68, 707 N.E.2d at 923. The only executive order referred to in Part IV of the Ohio Supreme Court's *Ritchey Produce* opinion is the January 27, 1972 executive order by former Ohio governor, John J. Gilligan. This executive order does not create any specific programs to assist minority contractors, nor does it impose specific requirements on any state agency. It is essentially an hortatory order which encourages all state departments, agencies, commissions, and employees under the governor's jurisdiction to "rigorously take affirmative action to insure equality of opportunity in the internal affairs of state government, as well as their relations with the public, including those persons and organizations doing business with the State." Executive

Order of January 27, 1972, filed herein as State's Exh. A, p. 4. The only substantive aspects of the order relate to the adoption of rules and regulations on equal employment opportunity in state and state-assisted construction projects, and the creation by the Director of the Department of Public Works of a new division for equal employment opportunity within that department. The focus of the order is on employment, not on the award of contracts. The order contains no numerical or other tangible goals of any kind.

The Final Report of the Ohio Attorney General's Task Force On Minorities In Business, issued in October 1978, identified a number of specific obstacles to small and minority-owned businesses seeking state contracts. They included lack of information about state contracting opportunities; lack of bonding capacity; lack of capital and financing; as well as lack of basic management, marketing, and accounting skills. The task force concluded that previous state projects to assist minority businesses "are ineffective, fragmented and limited in scope." Final Report, p. 27. The Attorney General recommended various programs to remove these impediments, including the establishment of a state alternative bonding program of last resort; the improvement of the system of disseminating information regarding the availability of state contracts; the creation of a department of minority business development to provide a variety of services, including management and technical assistance, procurement and bid packaging assistance, bonding underwriting and bonding technical assistance, and direct loan and loan guarantee financing. All of these recommendations could have been implemented on a race-neutral basis before resorting to race-conscious relief. There is no indication that the Ohio General Assembly ever considered doing so. When the General Assembly did adopt programs providing lending and bonding assistance, they were part of the same race-

conscious program which contains the set-aside quotas here under attack and they were limited to the members of the four specified racial minorities. The failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the state of Ohio to consider race-neutral means before adopting the MBE Act of 1980 likewise dooms Ohio's program of race-based quotas.

b) Flexibility

The Ohio Supreme Court held in *Ritchey Produce* that Ohio's MBE program satisfied the "flexibility" prong of the "narrowly tailored" analysis, because all set-aside requirements are to be met "approximately" and because the waiver provisions of the program have been applied in a flexible manner. *See Ritchey Produce*, 85 Ohio St.3d at 268, 707 N.E.2d at 924. The evidence presented in the instant case, however, shows that there is no justification for concluding that the word "approximately," in the set-aside statute results in flexibility. Indeed, to the contrary, the evidence in the instant case revealed that in the case of construction, the state has used the word "approximately" to justify exceeding the set-aside goals, but never for reducing or eliminating them. So, instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority businesses.

In July 1995, an MBE improvement team, consisting of employees from eight cabinet agencies and the governor's office, evaluated the success of the Ohio MBE program and reported that "the state has met and exceeded the construction goals for many years." State Sponsored Equal Opportunity Programs in Ohio, March 28, 1996, Appendix I, Final Report of the MBE Improvement Team, July 1995, filed herein as Plaintiff's

Exh. 1, p. A-10. During the ten-year period from fiscal year 1988 through fiscal year 1997, the percentage of the dollar value of prime construction contracts set aside for exclusive bidding by minority firms ranged from a low of 7.0 percent to a high of 9.40 percent. *See* Plaintiff's Exhs. 2 through 10.

The number and dollar amounts of contracts to be set aside for exclusive bidding by minority contractors is determined separately by each of the agencies or departments of state government, and by each of the state colleges and universities. Some of these agencies have often far exceeded the five percent quota mandated by the MBE statute. For example, in fiscal year 1996-97, 20.0 percent of the forty-five million dollars budgeted for prime construction contracts by the Department of Public Safety was set aside for bidding by minority firms only. And, in the same year, 12.2 percent of the seventy million dollar budget of the Department of Rehabilitation and Correction was set aside for minority bidders only. *See* Plaintiff's Exh. 10, p. 10. All of these percentages relate to contracts set aside for bidding which are restricted to minority-owned firms. They do not include the additional contracts which minority-owned firms are awarded in free competition in the open market. The evidence in the instant case showed that, as one would expect, minority firms do compete for these contracts and are often successful, but the state does not keep records on the dollar value of the contracts minority firms obtain through free competition. The set-aside goals are not adjusted for the dollar amount of contracts awarded on the open market.

In *Croson*, the Supreme Court held that the Richmond plan was not "narrowly tailored" observing that:

> Since the city must already consider bids and waivers on a case by case basis, it is difficult to see the need for a rigid numerical quota. . . .

Croson, 488 U.S. at 508. Justice O'Connor, writing for the Court, noted that the congressional scheme upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination. *Id.* She went on to note that, unlike the program upheld in *Fullilove*:

> [t]he Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.
>
> Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.

Id. The same defects exist in the Ohio plan. The waiver system for prime contracts focuses solely on the availability of MBEs. The awarding agency may remove the contract from the set-aside program and open it for bidding by non-minority contractors if no certified MBE

submits a bid, or if all bids submitted by MBEs are considered unacceptably high. But in either event, the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. With respect to subcontracting, the Ohio plan allows for administrative modification or waiver only if the prime contractor is unable to locate qualified MBEs after making a good faith effort. In neither instance is any consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors.

c) Duration of the relief

One critical prong of the "narrowly tailored" test is limited duration. Such a program must be "appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" *Adarand*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)). In *Detroit Police Officers Association*, 989 F.2d at 228, the Sixth Circuit Court of Appeals stated that:

> [l]imiting the duration of a race-conscious remedy which clearly impacts adversely upon the plaintiffs is a keystone of a narrowly tailored plan as may be seen by recent Supreme Court decisions.

See also Middleton v. City of Flint, Michigan, 92 F.3d 396, 413 (6th Cir. 1996), *cert. denied*, 520 U.S. 1196 (1997) (remedial plan for promotion of police sergeants which lasted nine years was not "narrowly tailored").

In *Ritchey Produce*, the Ohio Supreme Court responded to the duration element of the "narrow tailoring" requirement of strict scrutiny, and found that element satisfied because "the program is now and has

always been subject to continuing reassessment and review by the General Assembly." *Ritchey Produce*, 85 Ohio St.3d at 269, 707 N.E.2d at 925. This, quite obviously, begs the question. The 1980 MBE Act is unlimited in duration. When the Act was passed, an attempt to include a three-year sunset provision by amendment was defeated. *See Keip*, S.D. Ohio No. C-2-82-446, p. 9. While it is true that the Ohio General Assembly has revisited the provisions of Ohio's MBE Act on six separate occasions since 1980, those revisitings have been limited to minor adjustments. *Ritchey Produce*, 85 Ohio St.3d at 269-70, 707 N.E.2d at 925. There is no evidence that, at any time during the nearly two decades the Act has been in effect, the General Assembly has ever reconsidered whether a compelling state interest exists which would justify the continuation of a race-based remedy. One of the exhibits in the instant case was the affidavit of Lynn R. Wachtman, a member of the Ohio House of Representatives who has served continuously since 1985. Mr. Wachtman's affidavit states:

> 5. During my tenure in the General Assembly legislation which sought to substantially modify or repeal race based set asides has been introduced. On no occasion did any such legislation advance for serious consideration of passage. It is my opinion that it would be politically impossible for any legislation substantially altering or repealing R.C. §123.151 to be passed in the General Assembly of Ohio. There are significant interest groups represented in the legislative process that have the ability and political influence to effectively block such legislation.

Wachtman Aff. P5, Plaintiff's Exh. 27.

In retrospect, Judge Engle's dissenting opinion in *Keip* seems almost prophetic:

> . . . Ohio's Minority Business Enterprise Act is fatally flawed by its failure to incorporate any durational limitations upon its operation. In its present form, this act presents a very real danger of fostering a dependency upon favoritism which is inimical to general principles of equality and, I believe, to the commands of the Equal Protection Clause.

Keip, 713 F.2d at 176.

> If an originally permissible race-conscious remedy continues to operate after fulfilling its objective of redressing past discrimination, it becomes an impermissible racial preference.
>
> The Ohio MBE Act contains absolutely no durational limitation and thus threatens to outlive its legitimate purpose.
>
> * * *
>
> I do not view this requirement as an incidental concern. I am unable to agree with the majority that the absence of any durational limits may be safely overlooked because it is "incredible" that a popularly elected legislature would suffer the continuance of such a law beyond the period of constitutional need. On the contrary, I find it entirely credible that such a law may remain in force well beyond the elimination

> of discriminatory effects. It is precisely this danger which has occasioned such emphasis in the courts upon some distinct termination or "sunset" provision.

Id. at 176, 177. The Ohio MBE Act of 1980 fails the "narrowly tailored" test because it is unlimited in duration.

d) The Relationship of the goals to the relevant market

In *Ritchey Produce* the Supreme Court of Ohio found that the numerical goals of the Ohio MBE Act "have a direct relationship to Ohio's contracting market[,]" 85 Ohio St.3d at 268, 707 N.E.2d at 924, citing its earlier discussion of the statistical evidence which purportedly showed that "minority-owned businesses accounted for approximately seven percent of all Ohio businesses," 85 Ohio St.3d at 258, 707 N.E.2d at 917. Assuming it was true that MBEs constituted approximately seven percent of all Ohio businesses (which it was not), the court does not explain how this would justify setting aside over twice that amount, or fifteen percent, of the state's business for minority firms. A goal which exceeds the percentage of available minority firms by over 100 percent bears no relationship to the relevant market, and fails this element of the "narrowly tailored" requirement of strict scrutiny.

But, in reality, the situation in Ohio is worse because it is likely that minority firms ready, willing, and able to perform state purchasing contracts are much less than seven percent of all of such firms in Ohio. As discussed above, the census data relied on by the state and accepted by the Supreme Court of Ohio arrived at the seven percent figure by comparing the number of minority firms with and without employees to all firms with

employees. If one were to use the census data for an "apples to apples" comparison of all MBE firms with employees (1,984) to all firms with employees (165,732), it would show that minority firms represent only 1.2 percent of all Ohio firms. Using this estimate of availability, it is apparent that the fifteen percent set-aside quota would be well over ten times what it should be.

Setting excessive and unreasonable goals which have no relation to the availability of minority-owned firms inevitably results in the sort of reverse discrimination against non-minority firms described in the following subsection of this opinion.

The state presented no evidence of the availability of minority-owned construction firms which are qualified to enter into prime construction contracts with the state of Ohio, nor any evidence of the availability of minority-owned firms which are qualified to perform subcontract work on state construction projects. There is no evidence that the prime contract goal of five percent or the subcontracting goal of seven percent have any relationship to the relevant market.

The goals of the Ohio MBE Act are not related to the relevant market and the Act fails this element of the "narrowly tailored" requirement of strict scrutiny.

e) Impact on the rights of non-minorities

The Ohio Supreme Court ended its analysis of whether the Ohio MBE Act was "narrowly tailored" by concluding that "the burdens imposed on non-MBEs by virtue of the set-aside requirements are relatively light." *Ritchey Produce*, 85 Ohio St.3d at 270, 707 N.E.2d at 925. The evidence presented here and elsewhere indicates otherwise.

The potential for arbitrary selection and the "bunching" of set-aside selections resulting in the exclusion of non-minority contractors from the opportunity to bid on a substantial portion of a large state agency's purchase contracts was one of the potential dangers of Ohio's set-aside scheme which Judge Kinneary noted in his decision in *Keip* nearly seventeen years ago:

> In determining which contracts will be set aside for minority bidding only, each state agency acts autonomously and exercises complete discretion. Individual agencies' practices in this regard can and do lead to essentially arbitrary selections. The factor of arbitrariness aside, however, some agencies have found it difficult or impossible to avoid "bunching" or concentrating their set-aside selections into a few particular areas for which there are minority businesses available to bid. Particularly with respect to procurement contracts, the vast majority of which are let by the Department of Administrative Services, there are frequently no certified minority vendors willing or able to bid on certain types of goods. In order to achieve its 15 percent quota under the Act, the Department is forced to set aside disproportionately large contracts for goods that minority vendors can deliver. In fiscal year 1982, the Department decided to set aside 100 percent of its contracts to purchase coal for the State of Ohio, and thus, non-minority coal producers were entirely denied the opportunity to sell any coal to the State.

Keip, S.D. Ohio No. C-2-82-446, pp. 17, 18. The evidence in the instant case revealed that the practices criticized by Judge Kinneary have continued for almost two decades. For a period of time, the Department of Rehabilitation and Corrections was satisfying its set-aside obligations by reserving all or nearly all of its plumbing contracts for minority bidders. Other state departments and agencies were engaging in similar practices. *See* Plaintiff's Exh. 14. As a result, non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work for large state agencies, departments, and institutions solely because of their race.

In 1994, a non-minority painting contractor which had enjoyed success in obtaining painting contracts with The Ohio State University filed suit in this court alleging that its revenues from painting contracts with the University had markedly declined, and that it had received none at all after 1991, as a result of the University's decision to set aside all of its painting contracts for minority bidders only. *See Henry Painting Co. v. The Ohio State University*, Case No. C-2-94-0196 (S.D. Ohio). In its complaint, Henry Painting challenged the constitutionality of the Ohio MBE Act facially and as applied. Depositions and exhibits filed in *Henry Painting* revealed that, in the early 1980s, The Ohio State University had difficulty satisfying its fifteen percent minority set-aside requirement for the purchase of goods and services and, rather than attempting to raise minority participation in each category of goods and services, it began establishing 100 percent set asides for certain goods and services, including painting, carpeting, electrical work and supplies, janitorial services and supplies, office supplies, stock form paper, and painting services. Thus, Henry Painting Company was effectively excluded from bidding on painting contracts for The Ohio State University because of the race of its owner. Over

time, the list of trades, services, and commodities which the University barred non-minorities from bidding on grew to thirty-seven.

While Henry Painting Company's motion for summary judgment was pending, the University settled the case by paying $300,000 and entering into a consent decree in which it agreed to discontinue its practice of setting aside 100 percent of all painting contracts for minority bidders. This settlement avoided a decision on the constitutionality of the 1980 MBE Act and it preserved the University's policy of setting aside 100 percent of other categories of goods and services for bidding by minorities only.

The evidence in *Henry Painting* showed that the University encouraged its various departments to exceed the fifteen percent set-aside requirement for goods and services. It issued a vendor's information booklet to purchasing agents, which stated, *inter alia*:

> The University's goal is to exceed the 15% state requirement. . . . It is important that each department contribute according to their potential and not stop once the 15% figure is reached.

Henry Painting, Plaintiff's Motion for Summary Judgment, Exh. E.

In the instant case, Dr. Merelyn Bates-Mims, Deputy Director of ODAS, Equal Opportunity Division, testified that there is no limit to the percentage of the dollar value of the purchasing contracts that any state agency department or institution may set aside for minority bidding, and there are no provisions for monitoring the set-asides to determine whether they conform in any way to the percentage of qualified MBEs

in the relevant market. The University apparently has little concern about the impact these policies may have on non-minority vendors. Pamela S. Clark, manager of the University's Minority Business Development Program, gave the following deposition testimony:

> Mr. Carvin:
> Q. Is there anybody at Ohio State University who has evaluated the effectiveness or fairness of the affirmative action program, so far as you know?
>
> Ms. Clark:
> A. Not that I am aware of.
>
> Mr. Carvin:
> Q. Does that trouble you at all?
>
> Ms. Clark:
> A. No, Mr. Carvin, it doesn't.

Henry Painting, Plaintiff's Motion for Summary Judgment, Exh. E.

The evidence in *Henry Painting* revealed that between the years 1992 and 1995, the University far exceeded its five percent set-aside requirement for construction services by awarding over twenty percent of its construction budget to minority firms: twenty-eight percent in 1992; twenty percent in 1994; and twenty-seven percent in 1995. *Henry Painting*, Plaintiff's Motion For Summary Judgment, Exh. N.

Since the early 1980s, The Ohio State University has been saying to many different kinds of trades and businesses: "Whites and other non-minorities need not apply." The evidence strongly suggests that other large

state agencies and institutions have likewise completely excluded non-minorities in various trades and businesses from the opportunity to sell their goods to them.

The plaintiff in *Ritchey Produce* may be yet another example of this kind of arbitrary concentration of set-aside selections. It appears that this small produce company in Zanesville, Ohio was able to obtain a two million dollar contract to supply fresh fruits and vegetables to state institutions as a result of being certified as a minority business enterprise by the ODAS. This, no doubt, represents a substantial part, perhaps even 100 percent, of the state's requirements. Mr. Ritchey is no longer able to bid on that two million dollar contract because of his race. Indeed, like Henry Painting Company, he may now be completely precluded from selling his product to the state of Ohio. Ironically, he could have kept that contract if he had been born in India instead of Lebanon. *See DLZ Corp. v. Ohio Dept. of Admin. Servs.*, 102 Ohio App.3d 777 (Ohio App. 10 Dist. 1995, 658 N.E.2d 28) (finding that Asian-Indians are "Orientals" within the meaning of the Ohio set-aside statute). The absurd and arbitrary nature of such a scheme of racial classifications was well-stated by Judge Hogan, the trial judge in *Ritchey Produce*:

> Working our way north and west from India we first come to Pakistan, then Iran, then Iraq, then Syria, and finally Lebanon. If Asian Indians are "Oriental", shall we exclude Pakistanis separated from India only by the Great Indian Desert? And if Pakistanis are "Oriental", shall we exclude Iranians who share a common border with Pakistan? And if Iran is "Oriental", shall we exclude Iraq separated from Iran only by the Zagros Mountains? And if Iraq is "Oriental", shall we exclude

> Syria for the Euphrates River flows through both countries? And finally if Syria is "Oriental", how can its contiguous neighbor Lebanon be anything but "Oriental"?
>
> This Court can think of few things more repugnant to our constitutional system of government than the construction of a statute that would exclude a group of United States' [sic] citizens and residents of Ohio from a State program, the sole criteria for exclusion being the side of a river, a mountain range, or a desert their ancestor decided to settle.

The evidence in the instant case revealed that, in 1995, eighty percent of the dollar value of all set-aside contracts went to only five percent of the certified MBE contractors. Report to the Governor, State Sponsored Equal Opportunity Programs In Ohio, filed herein as Plaintiff's Exh. 12, p. 3. These firms include highly successful MBE firms such as the intervenor herein, the Sherman R. Smoot Corp., which is listed among the top four hundred contractors in the nation with revenues of $110.7 million in 1997. Plaintiff's Exh. 15.

In light of the concerns expressed by Judge Kinneary in his 1982 decision in *Keip*, the evidence presented in *Henry Painting*, and the evidence in the instant case, it appears that Ohio's MBE Act which was created ostensibly to remedy past discrimination against minority-owned firms in the sale of goods and services to the state of Ohio has become a tool for reverse discrimination against non-minority firms.

f) Random inclusion of minority groups

The Ohio MBE Act provides race-based benefits to four specific minority groups: blacks, American Indians, Hispanics and Orientals. R.C. 122.71(A)(1).

In *Ritchey Produce*, the Ohio Supreme Court acknowledged that "the United States Supreme Court specifically warned against the 'random inclusion' of minority groups in an MBE set-aside plan." *Ritchey Produce*, 85 Ohio St.3d at 266, 707 N.E.2d at 922. It went on to say that "the information that was considered by the General Assembly at the time Ohio's MBE program was first adopted in 1980 included information concerning the four specific minority groups specified in the [MBE statute]." *Id.* at 265, 707 N.E.2d at 922. However, the only information the court cited in support of this statement was one sentence in Judge Tyack's 1979 decision in *Ohio Building Chapter, AGC* discussed *supra*. There is not the slightest hint in the briefs filed in that case that the parties had any information about the number of black, Hispanic, Oriental or American Indian-owned construction firms, or the respective shares of the total capital improvement expenditures they received. None of the statistical information discussed in Part IV of the *Ritchey Produce* opinion breaks down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. There is no indication that this kind of information was included in the statistical data which the Ohio General Assembly possessed in 1980.

In *Croson*, the Supreme Court noted that "it may well be that Richmond has never had an Aleut or Eskimo citizen." *Croson*, 488 U.S. at 506. Similarly, it may well be that in 1980, no American Indian-owned construction firm had ever sought to perform a prime construction contract for the state of Ohio. The apparent random

inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Ohio "strongly impugns the [states'] claim of remedial motivation." *Croson*, 488 U.S. at 506.

VI.

The Ohio Supreme Court concluded its *Ritchey Produce* opinion with the statement that "Ohio's MBE program should be upheld unless it is clearly unconstitutional beyond a reasonable doubt." *Ritchey Produce*, 85 Ohio St.3d at 274, 707 N.E.2d at 928. The proposition that a program of race-based benefits should be upheld unless it is "clearly unconstitutional beyond a reasonable doubt" appears to be a novel one in equal protection jurisprudence. Ohio's high court cites no precedent to support this proposition of law, and it is difficult to reconcile it with pronouncements contained in various opinions of the Supreme Court of the United States which have become settled law:

> Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

Regents of the Univ. of California v. Bakke, 438 U.S. 265, 291 (1978) (Powell, J., joined by White, J.).

> Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.

Fullilove, 448 U.S. at 491.

> The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

Croson, 488 U.S. at 501.

> [A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."

Adarand, 515 U.S. at 224.

CONCLUSION

In determining whether to grant a stay pending appeal, the court should consider the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991), *rev'd on other grounds*, 954 F.2d 1174 (6th Cir. 1992) (citing *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)). These well known factors are: "1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay." *Griepentrog*, 945 F.2d at 153.

This court believes that it is very unlikely that the state will prevail on the merits of its appeal. The state

will not sustain any irreparable injury if a stay is not granted. If the court grants the stay, there is a great likelihood that others will be harmed, specifically non-minority businesses which seek to do business with the state will be harmed by being excluded from the opportunity to bid on state contracts solely because of their race. These same non-minority businesses have suffered from the effects of an illegal and unreasonable program of race-based quotas for nearly twenty years, and this court believes that it would be intolerable to permit that harm to continue for one more day. The public interest in this case is represented by the principles embodied in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In this case, the public interest would not be served but instead violated if the court were to grant the requested stay.

The motion for stay pending appeal is denied.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: May 20, 1999

1972
SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES

Bureau of the Census
Special Report

Line Number	Geographic division State, and industry	All firms Firms (number)	Gross receipts ($1,000)	With paid employees Firms (number)	Employees (number)
1	Middle Atlantic	44,309	1,735,232	7,658	38,254
2	New York	23,844	882,578	3,798	20,259
3	Construction	1,468	60,434	227	1,819
4	Manufacturing	615	69,864	280	3,629
5	Transportation and public utilities	1,812	36,386	165	836
6	Wholesale trade	584	127,890	194	890
7	Retail trade	6,513	334,134	1,515	5,881
8	Finance, insurance, and real estate	1,179	55,246	188	1,604
9	Selected services	10,163	179,106	1,196	5,412
10	Other industries	205	3,422	15	125
11	Industries not classified	1,305	14,096	18	63
12	New Jersey	8,762	365,706	1,523	7,683
13	Construction	784	36,576	166	952
14	Manufacturing	166	25,840	87	995
15	Transportation and public utilities	1,134	35,213	123	602
16	Wholesale trade	166	47,208	56	368
17	Retail trade	2,465	149,258	552	2,379
18	Finance, insurance,	303	17,105	45	473

	and real estate				
19	Selected services	3,042	47,153	479	1,878
20	Other industries	134	1,807	10	29
21	Industries not classified	568	5,746	5	7
22	Pennsylvania	8,903	408,948	1,637	9,312
23	Construction	752	40,652	143	792
24	Manufacturing	166	23,823	79	1,096
25	Transportation and public utilities	639	18,582	89	589
26	Wholesale trade	129	38,554	63	364
27	Retail trade	2,750	201,765	686	3,492
28	Finance, insurance, and real estate	300	21,238	69	486
29	Selected services	3,768	59,672	494	2,440
30	Other industries	77	1,309	6	19
31	Industries not classified	322	3,353	8	34
32	Not allocated by State	2,800	78,000	700	1,000
33	East North Central	47,304	2,066,662	9,661	55,454
34	Ohio	11,877	394,574	1,984	10,792
35	Construction	1,188	48,002	212	1,331
36	Manufacturing	151	23,519	52	834
37	Transportation and public utilities	1,341	30,537	119	461
38	Wholesale trade	107	23,897	44	286
39	Retail trade	3,363	184,621	892	4,385
40	Finance, insurance, and real estate	709	14,869	67	(D)
41	Selected services	4,396	62,607	573	3,124
42	Other industries	148	2,270	10	32

43	Industries not classified	472	4,252	15	(D)
44	Indiana	3,831	151,496	775	4,695
45	Construction	393	16,840	96	649
46	Manufacturing	50	4,558	20	215
47	Transportation and public utilities	396	10,190	29	(D)
48	Wholesale trade	51	21,380	26	(D)
49	Retail trade	1,176	67,119	361	1,813
50	Finance, insurance, and real estate	152	3,151	22	103
51	Selected services	1,369	25,548	211	1,445
52	Other industries	44	1,187	6	31
53	Industries not classified	198	1,522	4	(D)
54	Illinois	15,475	788,948	3,060	19,929
55	Construction	845	50,897	177	1,446
56	Manufacturing	308	84,226	126	2,110
57	Transportation and public utilities	906	30,150	102	800
58	Wholesale trade	300	78,693	108	611
59	Retail trade	5,829	370,306	1,515	7,826
60	Finance, insurance, and real estate	816	48,561	163	1,863
61	Selected services	5,548	116,156	840	5,153
62	Other industries	131	2,734	7	64
63	Industries not classified	792	7,225	22	56
64	Michigan	9,483	481,772	2,070	12,772
65	Construction	715	37,648	135	948
66	Manufacturing	152	35,071	73	960
67	Transportation and public utilities	788	18,871	88	660
68	Wholesale trade	121	57,954	49	605

69	Retail trade	3,187	242,020	1,040	5,553
70	Finance, insurance, and real estate	559	18,135	75	596
71	Selected services	3,437	65,495	588	3,394
72	Other industries	148	2,661	12	28
73	Industries not classified	378	3,917	10	26

D Withhold to avoid disclosing figures for individual companies.

2 Not calculated for national sample.

COUNTY BUSINESS PATTERNS
The State, by Industry: 1972

Line Number	With paid employees				Without paid employees	
	Gross receipts ($1,000)	Average employees per firm (number)	Average receipts per firm ($1,0000)	Firms (number)	Gross receipts ($1,000)	Average receipts per firm ($1,000)
1	1,198,921	5	157	36,651	536,311	15
2	619,822	5	163	20,046	262,756	13
3	45,211	8	199	1,241	15,223	12
4	65,887	13	235	335	3,977	12
5	20,196	5	122	1,647	18,190	11
6	116,587	5	601	390	11,303	29
7	215,184	4	142	4,998	118,950	24
8	46,364	9	247	991	8,882	9
9	106,100	5	89	8,967	73,006	8
10	1,112	8	74	190	2,310	12
11	3,181	4	177	1,287	10,915	8

12	253,436	5	166	7,239	112,270	16
13	25,497	6	154	618	11,079	18
14	24,505	11	282	79	1,135	14
15	19,775	5	161	1,011	15,438	15
16	43,906	7	784	110	3,302	30
17	98,859	4	179	1,913	50,399	26
18	14,454	11	321	238	2,651	10
19	25,768	4	54	2,563	21,385	8
20	566	3	57	124	1,241	10
21	106	1	21	563	5,640	10
22	279,763	6	171	7,268	129,185	18
23	24,507	6	171	609	16,145	27
24	22,158	14	280	87	1,665	19
25	9,896	7	111	550	8,684	16
26	34,646	6	550	66	3,908	59
27	136,244	5	199	2,064	65,521	32
28	18,513	7	268	231	2,725	12
29	32,539	5	66	3,274	27,133	8
30	469	3	78	71	840	12
31	789	4	99	314	2,564	8
32	45,900	1	66	2,100	32,100	15
33	1,539,113	6	159	37,643	527,549	14
34	276,402	5	139	9,893	118,172	12
35	34,296	6	162	976	13,706	14
36	22,433	16	431	99	1,086	11
37	15,358	4	129	1,222	15,179	12
38	22,595	7	514	63	1,302	21
39	132,310	5	148	2,471	52,311	21
40	(D)	(D)	(D)	642	(D)	(D)
41	38,541	5	67	3,825	24,066	6
42	940	3	94	138	1,330	10
43	(D)	(D)	(D)	457	(D)	(D)

44	112,387	6	145	3,056	39,108	13
45	12,519	7	130	297	4,321	15
46	4,265	11	213	30	293	10
47	(D)	(D)	(D)	369	(D)	(D)
48	(D)	(D)	(D)	25	(D)	(D)
49	49,349	5	137	815	17,770	22
50	1,849	5	84	130	1,302	10
51	17,681	7	84	1,158	7,867	7
52	455	5	76	38	732	19
53	(D)	(D)	(D)	194	(D)	(D)
54	600,842	7	196	12,415	188,106	15
55	39,876	8	225	688	11,021	16
56	81,138	17	644	182	3,068	17
57	18,499	8	181	804	11,651	14
58	72,966	6	676	192	5,707	30
59	268,920	5	178	4,314	101,386	24
60	41,603	11	255	653	6,958	11
61	76,415	6	91	4,708	39,741	8
62	733	9	105	124	2,001	16
63	672	3	31	70	6,553	9
64	369,120	6	178	7,413	112,652	15
65	27,911	7	207	580	9,737	17
66	33,839	13	464	79	1,232	16
67	9,754	8	111	700	9,117	13
68	55,820	12	1,139	72	2,134	30
69	183,672	5	177	2,147	58,348	27
70	13,089	8	175	484	5,046	10
71	43,095	6	73	2,849	22,400	8
72	1,350	2	113	134	1,311	10
73	590	3	59	368	3,327	9

D Withhold to avoid disclosing figures for individual companies.

2 Not calculated for national sample.

APPENDIX B-2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

The Associated General Contractors of Ohio, Inc., et al.,
Plaintiffs,

vs.

Sandra Drabik, et al.,
Defendants.

Case No. C2-98-943

JUDGE JAMES L. GRAHAM

ORDER

This action seeks declaratory and injunctive relief challenging the constitutionality of Ohio Revised Code Section 123.151. This action arises out of a set-aside contract sought to be awarded by defendants in connection with the construction of the Administration Building at the Toledo Correctional Institution. A preliminary injunction hearing was consolidated with a trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure and trial to the Court commenced on October 26, 1998. Based upon the reasons set forth in the Court's findings and conclusions announced from the bench on October 28, 1989; it is hereby

ORDERED, ADJUDGED AND DECREED

1. Ohio Revised Code Section 123.151 and all rules, regulations and practices promulgated thereunder, which provide for and implement racial or ethnic preference provisions for the awarding of State construction contracts and State construction subcontracts violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and are therefore, invalid, null and void;

2. Ohio Revised Code Section 123.151 violates the rights of plaintiffs' members under the Fourteenth Amendment to the United States Constitution and the laws of the United States, including 42 U.S.C. §§ 1981 and 1983;

3. The defendants Sandra Drabik, Director of the Ohio Department of Administrative Services, and Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Corrections, are enjoined from awarding the set-aside contract for the construction of the Administration Building at the Toledo Correctional Institution unless and until the race and ethnicity requirements of said contract are removed;

4. The defendants Sandra Drabik, Director of the Ohio Department of Administrative Services, and Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Corrections, and their representatives, agents, successors and employees, and all persons acting in concert or participation with them, are enjoined from implementing or enforcing the provisions of Ohio Revised Code § 123.151 and all rules, regulations and practices promulgated thereunder which provide for racial or ethnic preferences for the awarding of state construction contracts and subcontracts.

5. The plaintiffs are prevailing parties under 42 U.S.C. § 1988 and may seek an award of reasonable

attorney fees in an amount to be determined by the Court; and

6. The plaintiffs are entitled to recover their costs herein.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: October 30, 1998

APPENDIX B-3

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

The Associated General Contractors of Ohio,
Inc., et al.,
Plaintiffs,

vs.

Sandra Drabik, et al.,
Defendants.

Case No. C2-98-943

PROCEEDINGS

BEFORE THE HONORABLE JAMES L. GRAHAM, UNITED STATES DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, ON WEDNESDAY, OCTOBER 28, 1998.

APPEARANCES:

KEVIN McDERMOTT
TROY MORRIS

On behalf of the Plaintiff.

DARIUS KANDAWALLA
JUDITH FRENCH

On behalf of the Defendant.

DONALD LEACH
JOHN YOUNG

On behalf of the Intervenor.

JUDGE'S DECISION

* * * * * * * *

THE COURT: Counsel, I want to take several minutes to reflect on your arguments, also to review my notes. So we are going to stand in recess for the next several minutes. I have been informed, Mr. Leach, that you have a commitment and you will have to leave at 10:00.

MR. LEACH: Yes, for approximately an hour. It is a family commitment.

THE COURT: You are certainly excused, and you may feel free to leave when you are required to do so.

MR. LEACH: Thank you.

THE COURT: Mr. Cessner, you may recess court.

(Short recess).

THE COURT: Counsel, thank you for your patience.

* * * * * * * *

THE COURT: Now, let's begin then with the legal standards that apply to a case of this kind. The Court has consolidated the hearing on the motion for a preliminary injunction with the hearing on the merits of this case, and

the Court is prepared to render a decision on both issues this morning and to rule on the plaintiff's request for injunctive relief, not only on a preliminary but on a permanent basis, and decide this case on its merits.

Now, let me begin with just a general discussion of the equal protection clause. The equal protection clause guarantees that no state shall deny to any person within its jurisdiction the equal protection of laws. That is the precise language of the Fourteenth Amendment of the United States Constitution. The central purpose of this clause is to prevent the states from purposefully discriminating between individuals on the basis of race. Thus, preferences based on racial criteria must receive a most searching examination to make sure that they do not conflict with constitutional guarantees, and many of these phrases will be familiar to counsel because they come directly from landmark decisions of the United States Supreme Court.

All governmental classifications by race are subject to strict scrutiny regardless of whether they are supported by a remedial or benign purpose. That of course was the pronouncement of the Supreme Court in the case of *City of Richmond versus J.A. Croson*.

The party defending the plan bears the burden of producing evidence that the plan is constitutional, while the party challenging the plan retains the ultimate burden of proving its unconstitutionality. Now, it is true that, in general, state laws are entitled to a presumption of validity. But not all legislation is entitled to the same presumption of validity. The presumption is not present when a state has enacted legislation whose purpose or effect is to create classes based upon racial criteria since racial classifications in a constitutional sense are inherently suspect.

Now, a government actor does have a compelling state interest when its concern is remedying past discrimination, but the government actor must have a strong basis in evidence of past discrimination on the part of the governmental entity and the need for remedial action. A mere assertion by the governmental entity that remedial action is required is not sufficient. The state actor must produce evidence that the identified effects were caused by past discrimination, and that the effects are of sufficient magnitude to justify the program, and that the program was adopted to remedy the identified present effect of past discrimination. Blind judicial deference to legislative or executive pronouncements of necessity has no place in the equal protection analysis.

The existence of societal discrimination alone can't support a racial classification. Rather, there must be some showing of prior discrimination by the governmental unit either as an active or passive participant.

Now, the second branch of strict scrutiny or the second branch of the strict scrutiny analysis is whether the program at issue is narrowly tailored, and limitations on the duration of a race-conscious remedy is one of the keystones of a narrowly tailored plan.

Now, the State of Ohio has failed to produce any evidence in this proceeding of past discrimination against minority-owned business enterprises in state contracting. The plaintiff produced a number of witnesses, including officers and agents of the State of Ohio, who are directly involved in the award of state construction contracts who said that they are not aware of any unfairness or racial discrimination in the award of state construction contracts. The plaintiffs produced the statistical reports compiled by the state agency charged with the responsibility for maintaining statistics which show the percentage of awards of state contracts to certified

minority business enterprises. And even though those statistics fail to include the entire universe of minority-owned enterprises, even the limited universe reflected in these reports would fail to establish any disparity in the award of state construction contracts to minority business enterprises. Indeed, they would suggest just the opposite: Namely that minority business enterprises are receiving not only their fair share, but sometimes more than their statistically proportionate share of state construction contracts.

In the face of this evidence, the state has totally failed to show the existence of past discrimination in the award of state construction contracts in which the state was either an active or passive participant.

Now, the constitutionality of this particular state statute was the subject of previous litigation in this Court, and I refer, of course, to the *Keip* case, and the state has tendered as evidence supporting the statute the entire record in the *Keip* case. Now, the Court has not yet received the entire record in the *Keip* case, but the Court has sufficient information about the *Keip* case to be able to analyze what effect that record would have in the present case.

The trial court's decision in the *Keip* case is one of the exhibits in this record, and of course the judgment of the trial court was reversed by the Sixth Circuit Court of Appeals. However, it is clear that in the *Keip* case, the Sixth Circuit did not apply the correct standard. It did not anticipate the Supreme Court's decision in *Croson*, and it applied a relaxed standard. And, interestingly enough, even before the Supreme Court decided *Croson*, the Sixth Circuit changed its position and applied a more stringent standard, in *Michigan Road Builders Association, Inc. versus Milliken*, 834 F.2d 583. This was a 1987 case which was affirmed by the Supreme Court of

the United States, and it seems clear to me that if the Sixth Circuit had applied either *Michigan Road Builders*, the standard that applied there, or the standard of *Croson*, it would have reached a different result; it would have affirmed Judge Kinneary's decision which held that this statute was unconstitutional.

Judge Kinneary so held on December 15 of 1982, and his decision and his findings at that time are quite significant insofar as they deal with the evidence that the state would now rely on in justifying the constitutionality of this statute. This Court has reviewed Judge Kinneary's findings and is convinced that if this Court were to adopt those findings, which this Court undoubtedly would, that it would lead to the conclusion that the statute is unconstitutional based upon the evidence offered at that initial hearing back in 1982.

I note, first of all, that Judge Kinneary analyzed the evidence under either a strict scrutiny or intermediate scrutiny standard, and he apparently anticipated that a more stringent standard would be applied, and he was right. But even more compelling and even more relevant is his analysis of the evidence that was before him then, which is the same evidence the state relies on today. He said, beginning at page 24 of his opinion, "There can be no doubt today that the objective for remedying actual effects of identified racial discrimination is both a legitimate and important goal of state government. On the other hand, a mere desire to prefer members of one racial or ethnic group over others is inimical to the policies underlying the Fourteenth Amendment and can never constitute a legitimate state interest."

He said then that the Court must first inquire: What is the legislative purpose of the set-asides? The logical starting point is to examine the purpose or

purposes articulated by the general assembly which may be found in the act itself and in its legislative history.

He then observed that the purpose clause enacted as part of the act makes no reference whatsoever to a purpose of remedying effects of discrimination. Rather, the section speaks only in general terms of maintaining and improving the economic welfare of the people of the state by preserving and creating business and employment opportunities. The sole reference to minorities among the articulated purposes is found in the following phrase: To promote the welfare of the people of the state by encouraging the establishment and expansion of minority business enterprises.

So nowhere in the articulated purpose of this statute is there expressed the need to remedy the effects of past discrimination against minority business enterprises. Judge Kinneary went on to note that the available legislative history of House Bill 584 provides little more support, and that in all of the documentary evidence relating to the progress of the statute through the legislature, there is not even one clear unambiguous statement of a finding of discrimination.

Judge Kinneary went on to say, however, that he did not believe that the validity of House Bill 584 must stand or fall merely on the basis of the legislative purposes stated in the legislative record, and he then went on to examine what evidence the general assembly had before it. He noted this. He said the general assembly had before it evidence that minority business enterprises in Ohio have historically received a disproportionately small amount of state contracting business. The general assembly also had before it a comprehensive analysis in the form of the attorney general's task force report which identified many causes of that imbalance.

Judge Kinneary then said this: Nothing in that report nor in any other outside source of information available to the legislature—he said neither in that report nor in any other outside source of information available to the legislature was there any competent stated finding that this numerical imbalance resulted from unlawful discrimination by state officials in the contract awarding process. There is also no evidence in the record that the general assembly itself made any findings to this effect. Accordingly, it cannot reasonably be supposed that the purpose of the set-asides was to remedy the effects of unlawful discrimination on the part of the state.

He then continued, he said: The difficulty presented in this case, which can't be minimized, is the failure of the Ohio General Assembly to articulate either a finding of present or past discrimination or a purpose of remedying the effects of such discrimination.

He then went on to say that even if the general assembly had made adequate findings of discrimination, that this statute, House Bill 584, still does not survive review, and he pointed out that there is no time limit on the set-aside program set forth in the statute.

On page 28 of his decision, Judge Kinneary pointed out that the quotas upheld in the *Fullilove* case were part of a temporary appropriations bill, and that when the funds allocated under the bill were expended, the set-aside program was automatically terminated. He said this: The temporary nature of the set-asides was considered important because it insured that the race conscious program would not last longer than the discriminatory effects it was designed to eliminate.

Judge Kinneary then pointed out what was true then and what is still true today, that the set-asides

challenged here in contrast were enacted as permanent legislation. They can't be terminated unless repealed by the general assembly. Thus, there is no guarantee that their operation will end once the remedial purpose has been accomplished, nor is there any limitation on the economic harm that may be accumulated upon nonminority contractors.

Well, his remarks were certainly appropriate, and history has borne them out, because there is still no limit to these race-based set-asides, and, indeed, there has been no review, certainly no evidence in this case, that the State of Ohio has ever reviewed the question of whether or not, if there had been a remedial purpose for this legislation, whether it had been accomplished. Nor has the State of Ohio apparently given any consideration to the economic harm that this set-aside program has been cumulating upon nonminority contractors.

As Judge Kinneary pointed out back in 1982, when a contract is set aside under either of these provisions, speaking about the 5 percent prime contract set aside or the 7 percent subcontracting set aside, when a contract is set aside under either of these provisions, nonminority contractors are entirely foreclosed from bidding. The unfairness engendered by this system is made more acute by the manner in which the contracts are selected for set aside by state agencies. As noted, the choice of contracts to be set aside for minority bidding only is left within the discretion of each agency. Arbitrary exclusion of nonminority firms from bidding on certain contracts must inevitably follow.

If we take Judge Kinneary's findings of fact made in 1982 and apply current constitutional standards, there is no question that this statutory framework is unconstitutional.

Apparently the governor of the State of Ohio recognized this, the governor and his staff, when he adopted an executive order which promulgates a completely different method of assisting economically disadvantaged businesses by eliminating race-based criteria. Unfortunately the general assembly of the State of Ohio has never mustered the political courage to recognize what certainly has been clear since 1989 in the *Croson* decision, namely that this set-aside scheme is unconstitutional. And as Judge Kinneary indicated in 1982, there is no guarantee that this would ever be ended absent action by the state legislature, and at this late date, it doesn't appear that the state legislature would ever act to eliminate this program, which was not justified by the evidence then and which has not been justified by any evidence accumulated since then.

Now, I am mindful of the fact that it is certainly unusual for a court to declare a state statute which has such far-reaching effects unconstitutional from the bench, but I cannot imagine any clearer case than this for the unconstitutionality of the state statute. I would note that my conclusions are shared by the Court of Appeals of Franklin County, Ohio which held on October 7, 1997, in the case of *Ritchey Produce Company, Inc. versus State of Ohio Department of Administrative Services*, that this set-aside program was unconstitutional; and I would also note that my opinion is shared by another federal judicial officer, United States Magistrate Judge David S. Perelman who just one week ago today likewise held that this set-aside statute is unconstitutional. I am referring to the case of *Buddie Contracting Limited versus Cuyahoga County College District*, case number 96-CV-2136 in the United States District Court for the Northern District of Ohio, Eastern Division.

So the Court is granting the requested injunctive relief in this case, and, Mr. McDermott, I would ask you

to draft a proposed order to that effect and submit it to the Court promptly and I will sign it.

* * * * * * * *

THE COURT: Counsel, I would like to take a brief recess and review some of the authorities that deal with the standard for ruling on a request for stay pending appeal. I would like to be able to refer you to the relevant decisions of the Sixth Circuit that govern any ruling on such a motion, so we will take a recess for the next few minutes. Mr. Cessner, you may recess court.

(Short recess).

THE COURT: Counsel, before I announce my ruling on the request for a stay pending appeal, there were two additional issues that I had neglected to mention when I was reciting my reasons for my decision finding the set-aside statute unconstitutional. They are simply this: Even if the evidence the state had at the time of adopting the statute was considered to be sufficient to sustain it, that evidence consisted of information compiled in 1975 and 1978 and 1979. And although I agree with Judge Kinneary that the evidence the state had then was not sufficient to justify the statute, even if we were to say it was, it wouldn't suffice to justify the statute today because that data would be 20 years or more out of date.

I would also note that in the *Michigan Road Builders* case, one of the things noted by the Sixth Circuit was the failure of the State of Michigan to maintain or prepare or compile sufficient statistical data to permit a meaningful disparity analysis to support its set-aside statute which the Court found to be unconstitutional.

Now, addressing the motion for a stay pending appeal, the factors which govern such a motion are the following: First, the likelihood that the parties seeking the stay will prevail on the merits of the appeal; second, the likelihood that the moving party will be irreparably harmed absent a stay; three, the extent to which others will be harmed if the Court grants the stay; and four, the public interest in granting the stay.

Now, the Court believes that there is little likelihood that the state will prevail on the merits of an appeal in this case, and I so find for the very same reasons that I have just recited in support of my conclusion that the statute is unconstitutional, and so clearly unconstitutional as to not warrant any delay in rendering an opinion and decision to that effect.

Second, the likelihood that the moving party will be irreparably harmed. I don't see any likelihood that there will be any irreparable harm to the State of Ohio. The fact that certain state employees may no longer have a job to do is not the kind of harm that the Court is required to consider under this branch. It's harm to the parties.

Third is the prospect that others will be harmed if the Court grants the stay. Well, indeed others will be harmed if the Court grants the stay. Those that will be harmed will be all of those business enterprises that seek to bid on state contracts, both prime contracts and subcontracts, construction contracts, who would otherwise be excluded from the opportunity to do so because of these set-aside requirements. That is the kind of harm Judge Kinneary was concerned about when he held the statute unconstitutional back in 1982. So if the Court were to grant a stay, it would simply continue the harm that has been shown to exist in this case, namely the harm of excluding certain citizens from the opportunity to bid on

state contracts and excluding them on the basis of their race or ethnicity. That is an injury of constitutional dimension.

Fourth is the public interest in granting the stay. I believe that granting the stay would be contrary to the public interest. The public interest here is represented by the Fourteenth Amendment, the equal treatment of all citizens; and it would be in the public interest to deny this stay because granting it would perpetuate a statutory framework which violates the Fourteenth Amendment and denies certain citizens of the State of Ohio the right to bid on state construction contracts on the basis of their race and ethnicity.

So for those reasons, the Court will deny the request for a stay pending appeal.

Counsel, is there anything further today?

MR. McDERMOTT: Nothing from us, Your Honor, thank you.

MS. FRENCH: No, Your Honor.

MR. KANDAWALLA: Thank you.

MR. YOUNG: Thank you, Your Honor.

THE COURT: I want to thank the lawyers in this case for their professionalism and for their advocacy skills. This case was well presented. The Court appreciates that. With that, Mr. Cessner, you may adjourn court.

Thereupon, the proceedings were adjourned at 12:30 p.m.

APPENDIX B-4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-4393

ASSOCIATED GENERAL CONTRACTORS OF OHIO, INC.; ASSOCIATED GENERAL CONTRACTORS OF NORTHWEST OHIO, INC.,
Plaintiffs-Appellees,

v.

SANDRA A. DRABIK, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES;
REGINALD WILKINSON, DIRECTOR OF REHABILITATION AND CORRECTION,
Defendants-Appellants.

Before: KENNEDY, RYAN, and BOGGS, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

APPENDIX C

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE I [1] STATE GOVERNMENT
CHAPTER 122: DEPARTMENT OF DEVELOPMENT
[MINORITY DEVELOPMENT FINANCING ADVISORY BOARD]

ORC Ann. 122.71 (Anderson 1996)

§122.71 Definitions.

As used in sections 122.71 to 122.83 of the Revised Code:

* * *

(E)(1) "Minority business enterprise" means an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and Orientals.

(2) "Owned and controlled" means that at least fifty-one per cent of the business, including corporate stock if a corporation, is owned by persons who belong to one or more of the groups set forth in division (E)(1) of this section, and that such owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership. In order to qualify as a minority business enterprise, a business shall have been owned and controlled by such persons at least one year prior to being awarded a contract pursuant to this section.

* * *

HISTORY: 138 v H 584 (Eff 12-17-80); 139 v H 694 (Eff 11-15-81); 139 v H 552 (Eff 11-24-81); 140 v S 227 (Eff 7-14-83); 146 v H 117. Eff 6-30-95.

APPENDIX D

PAGE'S OHIO REVISED CODE ANNOTATED

TITLE I [1] STATE GOVERNMENT
CHAPTER 123: DEPARTMENT OF ADMINISTRATIVE SERVICES—PUBLIC WORKS
[DIRECTOR OF ADMINISTRATIVE SERVICES]

ORC Ann. 123.151 (Anderson 1996)

§123.151 Percentage of contracts to be set aside for minority business enterprises; minority participation in other contracts; misrepresentation prohibited.

(A) As used in this section, "minority business enterprise" has the meaning given in division (E)(1) of section 122.71 of the Revised Code.

(B)(1) The director of administrative services shall make rules in accordance with Chapter 119. of the Revised Code establishing procedures by which minority businesses may apply to the equal employment opportunity coordinator for certification as minority business enterprises.

(2) Any minority business enterprise that desires to bid on a contract under division (C)(1) or (D)(1) of this section or to be a minority business subcontractor or materialman under division (C)(2) or (D)(2) of this section shall first apply to the coordinator for certification. The coordinator shall approve the application of any minority business enterprise that complies with the rules adopted under this division. Any person adversely affected by an order of the coordinator denying certification as a minority business enterprise may appeal as provided in Chapter 119. of the Revised Code. The coordinator shall

prepare and maintain a list of certified minority business enterprises.

(C)(1) From the contracts to be awarded under section 123.15 and Chapter 153. of the Revised Code, the director shall select a number of contracts with an aggregate value of approximately five per cent of the total estimated value of contracts to be awarded in the current fiscal year. The director shall set aside the contracts so selected for bidding by minority business enterprises only. The bidding procedures for such contracts shall be the same as for all other contracts awarded under section 123.15 and Chapter 153. of the Revised Code except that only minority business enterprises certified and listed under division (B) of this section shall be qualified to submit bids.

(2)(a) Any contractor awarded a contract authorized by section 123.15 and Chapter 153. of the Revised Code or a contract included under division (D) of this section shall make every effort to ensure that certified minority business subcontractors and materialmen participate in the contract. In the case of contracts specified in division (A) of section 153.50 of the Revised Code, the total value of subcontracts awarded to and materials and services purchased from minority businesses shall be at least ten per cent of the total value of the contract, wherever possible and whenever the contractor awards subcontracts or purchases materials or services. In the case of all other contracts, the total value of subcontracts awarded to certified minority businesses shall equal at least five per cent of the total value of the contract. The total value of both the subcontracts awarded to and the purchases of materials made from such businesses shall equal at least ten per cent of the total value of the contract, wherever possible and whenever the contractor awards subcontracts or purchases materials or services.

(b) Except as provided in divisions (C)(3) and (4) of this section, the department of administrative services shall not enter into any contract authorized under section 123.15 and Chapter 153. of the Revised Code, including any contract set aside under division (C)(1) of this section, unless the contract contains a provision stipulating that the contractor, to the extent that it subcontracts work, will award subcontracts totaling no less than five per cent of the total value of the contract to minority businesses certified under division (B) of this section and that the total value of both the materials purchased from minority businesses certified under division (B) of this section and of the subcontracts awarded, to the extent that it subcontracts work, to such minority businesses will equal at least seven per cent of the total value of the contract; except that in the case of contracts specified in division (A) of section 153.50 of the Revised Code, the contractor shall stipulate that the total value of both the subcontracts awarded to and the materials and services purchased from minority businesses certified under division (B) of this section will equal at least seven per cent of the total value of the contract; but for the purposes of meeting the seven per cent requirement, the value of services shall not be more than five per cent of the total value of the contract. To the extent that the contractor subcontracts work less than the percentages required to be subcontracted to minority business enterprises as established in this section, the total value of the subcontracts awarded to minority business enterprises certified under division (B) of this section need not exceed the actual amount of such subcontracts awarded.

(3) Where a contractor is unable to agree to the provision required by division (C)(2) of this section because, having made a good faith effort, the contractor is unable to locate qualified minority businesses available to accept subcontracts or sell materials or services, the

contractor may apply to the coordinator and the set aside review board created under division (C)(4) of this section for a waiver or modification of the provision. The coordinator shall review the application and shall make a recommendation to the board to allow or disallow the request. After receipt of the coordinator's recommendation, the board shall review the request. If the board finds that the contractor has made a good faith effort to locate and reach agreement with minority business subcontractors and materialmen or service providers but has been unable to do so due to circumstances beyond the reasonable control of the contractor, it may authorize the contract to include, in lieu of the provision required by division (C)(2) of this section, a provision stipulating a lesser percentage of the total value of the contract to be designated for minority business subcontractors and materialmen or it may waive such provision entirely, or stipulate a higher percentage of services permissible in contracts specified in division (A) of section 153.50 of the Revised Code. If the board does not grant the contractor's application for waiver or modification, and if the contractor is unable to agree with the provision required by division (C)(2) of this section, the contractor's bid shall be deemed nonresponsive to the specifications for which the bid was submitted. Such nonresponsiveness shall not be a basis for forfeiture of a bid guaranty or bond required by law if the contractor made application to the board for a waiver or modification within ten days following notification of award of the contract.

If a contractor requests a waiver or modification because the contractor intends to contract with an enterprise that has sought certification as a minority business enterprise in accordance with division (B)(2) of this section, but the coordinator has not rendered a decision certifying the enterprise, the board may grant the modification or waiver requested, insofar as it applies

to that enterprise, if the enterprise's application for certification was filed with the coordinator at least sixty days prior to the contractor's request for waiver or modification and the contractor gives assurances satisfactory to the board that the contractor will award a contract to the enterprise seeking certification.

(4) There is hereby created in the department of administrative services the set aside review board, consisting of the director of administrative services or the director's designee, one member of the house of representatives appointed by the governor with the recommendation of the speaker of the house of representatives, and one member of the senate appointed by the governor with the recommendation of the president of the senate. Legislative members of the board shall serve four-year terms. Any legislative vacancy on the board shall be filled in the same manner as the original appointment. Members of the board shall not receive compensation but shall be reimbursed for all necessary expenses incurred in the course of their official duties.

The board shall hear all applications of contractors for waiver or modification of the contract provision required by division (C)(2) of this section and shall make a decision on each such application within thirty days of its receipt by the board.

(5) The director shall adopt rules in accordance with Chapter 119. of the Revised Code requiring the following notice to be included in boldface type and capital letters in all bid notifications and specifications for any contract authorized under section 123.15 and Chapter 153. of the Revised Code and in any contract covered by division (D) of this section: "Minority business set-aside requirements as specified in section 123.151 [123.15.1] of the Revised Code apply to this project. Copies of section 123.151 [123.15.1] of the Revised Code can be obtained

from any of the offices of the department of administrative services." The rules shall specify the number of days after the date on which bids are opened by which the successful bidder shall notify the contracting agency concerning the provisions the bidder has made or reasonably can be expected to make for meeting the provisions of division (C)(2) of this section.

(D)(1) To the extent that any state agency, other than the department of administrative services, and any port authority is authorized to enter into contracts for construction, the agency shall set aside a number of contracts the aggregate value of which equals approximately five per cent of the aggregate value of construction contracts for the current fiscal year for bidding by minority business enterprises only. The bidding procedures for the contracts set aside for minority business enterprises shall be the same as for all other contracts awarded by the agency or port authority, except that only minority business enterprises certified and listed under division (B) of this section shall be qualified to submit bids.

(2) All contracts for construction entered into by any state agency, other than the department of administrative services, and any port authority including contracts set aside under division (D)(1) of this section, shall contain the same provision required by division (C)(2) of this section, subject to modification or waiver by the set aside review board in the manner specified by divisions (C)(3) and (4) of this section. The rules of the director adopted under division (C)(5) of this section shall be applicable to contracts under this division.

(E) In the case of contracts set aside under division (C)(1) or (D)(1) of this section, if no bid is submitted by a minority business enterprise, the contract shall be awarded according to normal bidding procedures. The

contracting agency or port authority shall from time to time set aside such additional contracts for bidding only by minority business enterprises as are necessary to replace those contracts previously set aside on which no minority business enterprises bid and to ensure that, in any fiscal year, the aggregate amount of construction contracts awarded to minority business enterprises will equal approximately five per cent of the total amount of construction contracts awarded by the agency or port authority.

(F) This section does not preclude any minority business enterprise from bidding on any other contract not specifically set aside for minority business enterprises.

(G) No funds of any state agency or port authority shall be expended in any fiscal year for construction until the director of administrative services or the chairperson of the port authority, whichever is appropriate, certifies to the equal employment opportunity coordinator, the clerk of the senate, and the legislative clerk of the house of representatives that approximately five per cent of the aggregate amount of the projected expenditure for construction in the fiscal year has been set aside as provided for in this section.

(H) The department of administrative services, every other state agency authorized to enter into contracts for construction or contracts for purchases of equipment, materials, supplies, contracts of insurance, or services, and every port authority shall file a report every ninety days with the equal employment opportunity coordinator. The report shall be filed at a time and in a form prescribed by the coordinator. The report shall include the name of each minority business enterprise that the agency or port authority entered into a contract with during the preceding ninety-day period and the total

value and type of each such contract. No later than thirty days after the end of each fiscal year, the coordinator shall notify in writing each state agency and port authority that has not complied with the reporting requirements of this division for the prior fiscal year. A copy of this notification regarding a state agency shall be submitted to the director of budget and management. No later than thirty days after the notification, the agency or port authority shall submit to the coordinator the information necessary to comply with the reporting requirements of this division. If, after the expiration of this thirty-day period, the agency has not complied with the reporting requirements of this division, the coordinator shall certify to the director of budget and management that the agency has not complied with the reporting requirements of this division. A copy of this certification shall be submitted to the agency. Thereafter, no funds of the state agency required to report by this division shall be expended during the fiscal year for the construction or purchases of equipment, materials, supplies, contracts of insurance, or services until the coordinator certifies to the director of budget and management that the agency has complied with the reporting requirements of this division for the prior fiscal year.

If any port authority has not complied with the reporting requirement after the expiration of the thirty-day period, the coordinator shall certify to the speaker of the house of representatives and the president of the senate that the port authority has not complied with the reporting requirements of this division. A copy of this certification shall be submitted to the port authority. Upon receipt of the certification, the speaker of the house of representatives and the president of the senate shall take such action or make such recommendations to the members of the general assembly as they consider necessary to correct the situation.

(I) Any person who intentionally misrepresents himself or herself as owning, controlling, operating, or participating in a minority business enterprise for the purpose of obtaining contracts, subcontracts, or any other benefits under this section shall be guilty of theft by deception as provided for in section 2913.02 of the Revised Code.

HISTORY: 138 v H 584 (Eff 12-17-80); 139 v H 694 (Eff 11-15-81); 139 v H 552 (Eff 11-24-81); 139 v H 530 (Eff 5-28-82); 141 v H 201 (Eff 7-1-85); 142 v H 350 (Eff 7-7-87); 146 v H 169. Eff 4-9-96.

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

C. SCOTT JOHNSON, DIRECTOR, DEPARTMENT OF ADMINISTRATIVE SERVICES; REGINALD WILKINSON, DIRECTOR OF REHABILITATION AND CORRECTION,

Petitioners,

v.

ASSOCIATED GENERAL CONTRACTORS OF OHIO, INC.; ASSOCIATED GENERAL CONTRACTORS OF NORTHWEST OHIO, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a party challenges a race-based preference scheme, subject to a strict scrutiny standard of review, does a prior decision upholding that scheme which employed an incorrect standard of review have any effect on the burdens of production mandated by the heightened standard of strict scrutiny?

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INTRODUCTION

In the Court below, the unanimous decision of the Panel of the Sixth Circuit Court of Appeals ended almost twenty years of unjustified, unsupported, and ultimately unconstitutional enforcement of the Ohio Minority Business Enterprise Act ("MBEA"), a statutory scheme which set aside millions of state construction dollars to select minority groups. *See* Ohio Rev. Code § 123.151 (Baldwin 1998). The MBEA was enacted in the early 1980's, purportedly to remedy discrimination in state contracting. In support of the act's passage, the Ohio legislature relied upon executive and administrative agency task force considerations of complaints regarding, and statistics concerning, minority group participation in state purchasing.

In 1982, the MBEA was challenged upon equal protection grounds. The district court determined that the evidence presented, state studies from the middle and latter 1970's, was inadequate to support a conclusion of specific historical discrimination calling for remediation, which might justify a race-based set-aside program. In fact, the Court found that in all of the evidence supplied by the State of Ohio there was not one, clear, unambiguous statement of a finding of discrimination.

On appeal in 1983, the Sixth Circuit Court of Appeals overturned the district court's ruling out of deference to the legislature, giving it the benefit of the doubt that implicit fact-finding of discrimination underlay the MBEA. *See Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983). In the intervening 15 years between *Keip* and the current challenge to the MBEA, this Court mandated strict scrutiny as the standard of review for race-based

set-aside programs. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

Despite these unequivocal pronouncements, the Petitioners contend that principles of *stare decisis* require that the burdens of production required in strict scrutiny review be altered when a court has previously upheld a race-based statute, albeit under a now constitutionally infirm standard of review. Because Petitioners' position has no basis in law, the Petition for Certiorari should be denied and the decision of the Sixth Circuit Court of Appeals should stand.

STATEMENT OF THE CASE

1. The MBEA.

Ohio's MBEA has been in effect with only minor modifications since 1980. The statute operates at both the prime and sub-contract level. At the prime contract level the Director of the Department of Administrative Services is mandated to set aside construction contracts with an aggregate value of approximately 5% for bidding exclusively by certified Minority Business Enterprises ("MBE's"). *See* Ohio Rev. Code. § 123.151(C)(1). At the subcontract level every contractor who obtains a prime contract from the State of Ohio has a subcontracting requirement of utilizing certified MBE's for 7% of the value of subcontracts and materials. *See* Ohio Rev. Code § 123.151(C)(2)(b). Only *certified* MBE's, Blacks, American Indians, Hispanics, and Orientals, who go through the

certification process are entitled to the benefits of the MBEA. *See* Ohio Rev. Code § 123.151(B).

Becoming a certified MBE is entirely race driven. Only the four identified groups are eligible. There are no size limitations. There are no income limitations. There is not even a requirement that the applicant demonstrate it is qualified to perform the business for which it seeks certification. Additionally, there is no limit as to how long a business may stay in the program and, unlike more recent federal statutes, the MBEA has no graduation requirements. *See* Ohio Rev. Code § 123.151 *et seq.*

Since 1989 when this Court decided *Croson*, the State has done nothing to evaluate whether the MBEA continues to serve a compelling state interest and is narrowly tailored. In fact, when the proper standard of review is applied to the MBEA it is clear that the State of Ohio has *never* established a firm basis in evidence to justify the use of a race-based preference program.

2. The District Court Proceedings.

The underlying action was brought by the Associated General Contractors of Ohio, Inc. and the Associated General Contractors of Northwest Ohio, Inc. ("AGC") as a result of the State of Ohio's decision to set aside an eight million dollar ($8,000,000) contract for a new prison facility pursuant to the MBEA. The members of AGC were qualified, willing, and able to bid upon the set-aside contract but were prohibited from doing so because they did not meet the requirements associated with being a certified MBE. Consequently, AGC filed the present suit

and asserted that the set aside of the contract, as well as the underlying statute, violated the equal protection guarantees of the Fourteenth Amendment to the United States Constitution.

As conceded by the State in its Petition for Certiorari, during the district court proceedings the State presented all of the evidence that was before the Ohio General Assembly when the MBEA was enacted, as well as compliance reports prepared by State agencies since the enactment of the law. *See* Petition at 4. Moreover, the district court afforded the State the opportunity to introduce any and all evidence at its disposal which would justify the use of a race-based program.[1]

At the close of the evidence and in light of this Court's decisions in *Croson, supra,* and *Adarand, supra,* the district court properly found that the State of Ohio had no legitimate justification for the enactment and maintenance of the MBEA. The State offered no studies showing a statistical disparity between the number of minority firms awarded contracts in relation to their availability. The State did not present anecdotal evidence detailing any incidents of discrimination in state construction contracting. The only "evidence" the State offered to support the program was either unreliable, due to the fact it failed

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[1] The State argued at the trial that if afforded the opportunity of a sixth month continuance in the proceedings it could produce additional evidence justifying the MBEA. However, the testimony revealed that the State's record-keeping mechanisms tracked only certified MBE's, and not the entire universe of minority contractors, thus leaving these statistics meaningless to a strict scrutiny analysis. Accordingly, the district court denied the request for a continuance.

to track the entire universe of minority contractors, or grossly outdated. As a result of the changes in the law as determined by this Court, the district court returned to the prescient standards under which the MBEA had been previously invalidated in 1982. After a thorough review of the evidence the district court adopted the analysis of the district court's prior decision in 1982, which anticipated the requirements of *Croson* and enjoined the State from enforcing the provisions of the MBEA.

3. The Ohio Supreme Court Decision in *Ritchey Produce.*

During the pendancy of the State's appeal of the district court's decision, the Ohio Supreme Court decided *Ritchey Produce, Co., Inc. v. Ohio Dep't of Admin. Serv.*, 707 N.E.2d 871 (Ohio 1999). The Ohio Supreme Court found the MBEA, as it applied to goods and services, was constitutional under the equal protection provisions of the United States Constitution. The court purported to review the statue pursuant to strict scrutiny analysis. However, it ultimately concluded that:

> Ohio's MBE program should be upheld unless it is clearly unconstitutional beyond a reasonable doubt. While there may be some legitimate questions concerning Ohio's MBE program, and the question might even be a close one, we are not convinced beyond a reasonable doubt that Ohio's MBE program is unconstitutional. We have reviewed the program under the strict scrutiny test, and we are satisfied that it passes constitutional muster under the United States Supreme Court's guiding precedents.

Id. at 927.[2] Despite the Ohio Supreme Court's attempt to factually distinguish *Ritchey Produce* from this case, its decision directly conflicted with the district court's conclusion in that it relied upon the same evidence that was before the district court pertaining to construction contracting in upholding the goods and services portions of the MBEA.

4. The State's Reliance Upon *Ritchey Produce.*

Following the *Ritchey Produce* decision, the State moved the district court for a stay pending appeal of the underlying case. In its motion, the State contended that as a result of *Ritchey Produce*, it was likely that it would succeed on the merits of its appeal to the Sixth Circuit Court of Appeals. In considering the State's motion, the district court requested and was provided with all of the evidence before the Ohio Supreme Court in reaching its decision in *Ritchey Produce.*

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[2] In its reported decision denying the State's Motion for Stay Pending Appeal based upon the *Ritchey Produce* decision, the district court noted that: "The Ohio Supreme Court concluded in its *Ritchey Produce* opinion with the statement that 'Ohio's MBE program should be upheld unless it is clearly unconstitutional beyond a reasonable doubt.' *Ritchey Produce,* 85 Ohio St.3d at 274. The proposition that a program of race based benefits should be upheld unless it is 'clearly unconstitutional beyond a reasonable doubt' appears to be a novel one in equal protection jurisprudence. Ohio's high Court cites no precedent to support this proposition of law, and it is difficult to reconcile it with the pronouncements contained in the various opinions of the Supreme Court of the United States which have become settled law . . . " *Associated Gen. Contractors of Ohio, Inc. v. Drabik,* 50 F.Supp.2d 741, 771 (S.D. Ohio 1999).

Ultimately, the district court issued a lengthy opinion in which it found that its decision was not reconcilable with *Ritchey Produce* and that the State of Ohio had not presented evidence which would justify the use of a race-based preference program through the MBEA. *See Associated Gen. Contractors of Ohio, Inc.*, 50 F.Supp.2d at 741.

5. The Sixth Circuit Court of Appeals Affirmance.

Upon review, the Sixth Circuit Court of Appeals affirmed the district court's holding that the MBEA is unconstitutional when analyzed under the proper strict scrutiny review. In doing so, the court articulated its reasons for departing from *Keip*:

> When, in 1983, this court [decided *Keip*] we did so out of deference to the legislature, giving it the benefit of the doubt that implicit fact finding of discrimination underlay the MBEA. *See, Keip*, 713 F.2d at 170-171. But the Supreme Court has since required more. *See Miller v. Johnson*, 515 U.S. 900, 923, 132 L.Ed 2d 762, 115 S.Ct 2475 (1995) (holding legislation adopting racial distinctions to be entitled no deference); *Croson*, 488 U.S. at 499 (holding mere assertions of legislative purposes insufficient).

Associated Gen. Contractors of Ohio, Inc., 214 F.3d 730, 734 (6th Cir. 2000).

In reviewing the MBEA *de novo* under the proper legal standards as adopted by this Court, the Sixth Circuit determined that the State of Ohio had failed to show either a compelling interest or narrow tailoring which might justify the implementation of a race-based preference program. Additionally, the court concluded that its

opinion was not reconcilable with *Ritchey Produce*, notwithstanding the Ohio Supreme Court's attempt to distinguish the two cases. *See id.* at 740.

Thereafter, the State petitioned the Sixth Circuit for a rehearing *en banc*. In doing so, the State once again conceded that strict scrutiny review applied and yet continued to rely upon *Keip* and *Ritchey Produce* in claiming that the burden was on AGC to establish that a firm basis in evidence no longer existed. That request for rehearing was denied.

REASONS FOR DENYING THE PETITION

The MBEA, as enacted by the State of Ohio, fails strict scrutiny review in that it is neither narrowly tailored nor supported by a compelling government interest. The Petition should be denied because the State has failed to assert any meritorious reason for this Court to review the decision of the Sixth Circuit Court of Appeals.

1. *Stare Decisis* Is Inapplicable, And Thus The State Has Failed To Illuminate An Issue For This Court's Review.

In attempting to rely upon "the fundamentals of *stare decisis*", the State seeks to create an issue for review where clearly none exists. Despite the pronouncements of this Court in cases such as *Croson* and *Adarand*, which clearly establish the burdens of production under strict scrutiny, the State seeks to abdicate its responsibility under this heightened standard of review by contending that AGC had the burden of proving that the State no

longer had a firm basis in evidence to support a compelling governmental interest. It's sole basis for this contention is that the Sixth Circuit previously upheld the MBEA pursuant to a constitutionally infirm standard of review.

The State's argument is disingenuous at best and completely misconstrues the long standing pronouncements of this Court. Instead of challenging the well-reasoned and legally supported decisions of the lower courts and their clear conflict with the Ohio Supreme Court's *Ritchey Produce*, as it did below, the State now shifts focus and attempts to turn principles of *stare decisis* on their head and rewrite the long standing principles of strict scrutiny.

2. *Keip* Does Not Have Precedential Value Because It Was Decided Under A Constitutionally Infirm Standard of Review.

The State's reliance on the Sixth Circuit's decision in *Keip, supra*, for its precedential effect simply misses the mark. As acknowledged by the State it its Petition, *Keip* failed to apply strict scrutiny as now required by this Court, when it approved the MBEA in the early 1980's.

Subsequent to the ruling in *Keip*, this Court, in two landmark cases, clarified the legal standard for race-based classifications. *See Adarand Constructors, Inc.*, 515 U.S. at 200; *Croson*, 488 U.S. at 469. As set forth in the appellate court's well reasoned opinion, the *Keip* court upheld Ohio's MBE program based upon judicial deference, rather than the rigid mandates of strict scrutiny subsequently mandated by *Croson* and *Adarand*.

> When, in 1983, this court overturned Judge Kinneary's ruling in that case, we did so out of deference to the legislature, giving it the benefit of the doubt that implicit factfinding of discrimination underlay the MBEA. *See Keip*, 713 F.2d at 170-71. But the Supreme Court has since required more. *See Miller v. Johnson*, 515 U.S. 900, 923, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (holding legislation adopting racial distinctions to be entitled to no deference); *Croson*, 488 U.S. at 499, 109 S.Ct. 706 (holding mere assertions of legislative purposes insufficient).

Associated Gen. Contractors of Ohio, Inc., 214 F.3d at 734-735.

The *Keip* standard of "relaxed scrutiny" has not been the law of the Sixth Circuit since it was unambiguously rejected by this Court in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In fact, the Sixth Circuit had already taken note of the trend developing both in this Court and other circuit courts to apply the Equal Protection Clause strictly to racial discrimination in government contracting prior to the culmination of this doctrine in *Croson* and *Adarand*. *See, e.g., Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583, 587 (6th Cir. 1987).

It is beyond dispute that a federal court is obligated to apply the law in effect at the time it renders its decision. *See, e.g., Michigan Road Builders Ass'n, Inc.*, 834 F.2d at 589. Accordingly, in ruling on the present challenge to the MBEA, the lower court acknowledged that its application of strict scrutiny varied from *Keip's* application, owing to this Court's subsequent clarifications of the requirements for race-based preference programs.

> This court ruled in 1983 that the MBE was constitutional, *see Ohio Contractors Assn. v. Keip*, 713 F.2d 167 (6th Cir. 1983), overruling Judge Kinneary's judgment in the district court that Ohio's scheme was unconstitutional on its face, *see Ohio Contractors Ass'n v. Keip*, No. C-2-82-446 (S.D.Oh. Dec. 15, 1982). Subsequently, the Supreme Court, in two landmark decisions, explained and applied at length the criteria of strict scrutiny under which such racially preferential set-asides were to be evaluated. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). This court had already, in *Michigan Road Builders Assn. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), taken note of the trend developing both in the Supreme Court and Circuit Courts (which was to culminate in *Croson* and *Adarand*) to apply the Equal Protection Clause strictly to racial discrimination in government contracting. *Michigan Road Builders* departed from the more relaxed treatment that *Keip* had accorded to equal protection challenges to state contracting disputes. *See id.* at 598 (Lively, C.J., dissenting). *Croson* also noted that same evolution in this Circuit. *See* 488 U.S. at 477, 109 S.Ct. 706, 214 F.3d at 733.

Associated Gen. Contractors of Ohio, Inc., 214 F.3d at 733-734.

Accordingly, the Sixth Circuit was bound by well established precedents to apply the unambiguous requirements of strict scrutiny, as opposed to altering the burdens of production solely because a prior case was decided under constitutionally incorrect standards.

It is also important to note that the State by its own admission concedes that prior to the present case, no court had ever ruled upon the constitutionality of the MBEA under the strict scrutiny standard mandated and clarified by this Court in *Croson* and *Adarand*. *See* Petition at 8-9. Because *Keip* was based upon an incorrect standard of review, it defies logic how the State can now contend that the principles of *stare decisis* as a result of *Keip* could ever validly impact the decisions of the lower courts in this case.

3. The MBEA has never had a "firm basis in evidence."

Despite the State's repeated assertions to the contrary, in each instance that the MBEA has been subjected to the proper strict scrutiny standard of review by a federal court it has been declared unconstitutional. Beginning with Judge Kinneary in 1982, continuing with Judge Graham in 1998, and most recently with the Sixth Circuit Court of Appeals in 2000, every federal court that has reviewed the evidence relied upon by the Ohio legislature in enacting the MBEA under the proper strict scrutiny standard has concluded that it is legally inadequate to support a conclusion of specific historical discrimination by the State of Ohio.

As clearly set forth by the unanimous Panel, the evidence before the legislature in the early 1980's failed to prove a strong basis in evidence because: (1) raw statistical date evidencing "underrepresentation" or statistical disparities is insufficient to establish historical discrimination; (2) Ohio's statistical comparisons in 1978

did not take into account how many minority-owned businesses were contractors or that they were qualified, willing and able to perform state construction contracts; and (3) that the deficiencies of the four broad categories of evidence that were before the Ohio legislature are "glaringly clear." *Associated Gen. Contractors*, 214 F.3d at 736-739. Accordingly, the State was unable to establish the required "pervasive, systematic, and obstinate discriminatory conduct" that might justify the enactment and continued maintenance of the MBEA. *Id.* at 737 (*citing Adarand*, 515 U.S. at 237).

Despite these glaring evidentiary shortcomings, the State baldly asserts that because *Keip* upheld the MBEA, albeit under the constitutionally incorrect standard of review, that a firm basis in evidence of discrimination by the State of Ohio has been previously established. Certainly, "basic principles of *stare decisis*" do not require a court to rely upon a prior determination, which utilized a constitutionally incorrect standard of review, as precedent that establishes that the statutory scheme was constitutionally sound when enacted. The trial court and appellate court were bound to follow the law as it existed in 1998 and 2000, respectively, which clearly required strict scrutiny analysis. The State's argument not only turns principles of *stare decisis* on their head, but completely defies logic.

Moreover, principles of *stare decisis* do nothing to alter the evidentiary burdens in a case subject to strict scrutiny review. When a statute is challenged on constitutional grounds, only two scenarios exist: (1) *stare decisis* does not apply because the legal framework has changed and thus a court must revisit the issue or (2) *stare decisis* is

applicable and the binding precedent is applied. However, with its Petition, the State attempts to create a third option – it concedes that the legal framework has changed since the decision in *Keip*, but at the same time attempts to alter the burden shifting requirements of that changed framework. This is clearly a misapplication of the law regarding strict scrutiny as interpreted by this Court. Not one of the State's cited cases involve burden-shifting in actions subject to strict scrutiny, let alone race-based classifications generally.

Consequently, there is no basis for the State's contention that the Sixth Circuit placed itself in conflict with other circuits through its decision in this case. *See* Petition at 12 ("the Sixth Circuit thereby placed itself in conflict with other circuit courts on the issue of the proper allocation of the burden of production when a prior decision by a court is challenged."). The allocation of burdens pursuant to strict scrutiny has been well established by this Court. The State has not cited one case where a federal court has altered the manner in which strict scrutiny allocates burdens as the result of a race-based classification. Clearly, the State's misapplication of well-settled law does not warrant review of the lower court decision by this Court.

4. The Need for Careful Review.

As noted by the State in its Petition, this Court has cautioned that "[a]ny preference based upon racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273-274 (*citing*

Fullilove v. Klutznick, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.)). Clearly the present case evidences such a searching examination. AGC established, and the State conceded in its Petition, that the legal standard utilized in *Keip* is no longer viable as a result of the pronouncements of this Court. Accordingly, principles of *stare decisis*, as articulated by the State, are inapplicable to the present challenge.

CONCLUSION

Based upon the forgoing, AGC respectfully requests that the State's Petition for writ of certiorari be denied.

Respectfully submitted,

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